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DEATH TAKES PRESIDENT MERRILL E. OTIS
A GREAT JUDGE IS GONE

LAW AND ADMINISTRATIVE GOVERNMENT
DAVID A. SIMMONS

THE MICHIGAN ONE-MAN GRAND JURY
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NEW YORK JUDICIAL SELECTION CAMPAIGN RESUMED
CITIZENS COMMITTEE FORMED

USE OF PRE-TRIAL PROCEDURE IN STATE COURTS
WITH MAP ILLUSTRATION

AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

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Death Takes President Merrill E. Otis

WHEN THE Honorable Merrill E. Otis passed away in a Kansas City hospital on December 23, 1944, the American Judicature Society lost a distinguished president and loyal friend.

Judge Otis was elected to succeed the Honorable David A. Simmons as president of the Society at its meeting in Chicago on September 13, only three months and ten days before his death. Half of that time he spent in the hospital, but before his illness he had already entered upon his duties as president with the enthusiasm characteristic of everything he said and did.

In May, 1939, Judge Otis first entered the Society's official family as a Missouri director. A year later he became vice-president, a position he held until his election to the presidency last year. In 1939 the Society had seventy-seven members in Missouri. In 1944 the number was three hundred and seventy-seven. Among the several Missouri members responsible for that increase, Judge Otis was pre-eminent. He combed his large acquaintance of Missouri lawyers and judges, and by the hundreds they responded to his invitation.

The pages of this JOURNAL, as of many another legal publication, have been enriched by the writings of this wise and kindly Missouri judge. His address "Immutable Principles" delivered at the 1944 annual meeting and printed in the October JOURNAL, brought forth more expressions of appreciation from readers than anything else that has appeared in years.

Other organizations besides the American Judicature Society benefited from the services of Judge Otis. He was active in the American Bar Association, and in 1941 served as chairman of its Section of Judicial Administration. He was professor of constitutional law and president of the Kansas City School of Law, and a trustee of the University of Kansas City.

Judge Otis always looked back with pride on his origin as a humble Missouri farm boy. He attended the country schools of Nodaway County, and, fired by an ambition to go to Congress, secured a legal education at the University of Missouri. His first law office was in St. Joseph, in partnership with Louis V. Stigall, and he loved to recall his struggles to get started in practice. An early photograph of the two partners shows Stigall in his shirt sleeves, collar open, and Otis with his coat buttoned up. His explanation of the discrepancy was

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simple. "I had no shirt. Stigall had it."

Young Otis never went to Congress, although he won the Republican nomination for it in 1914, but progress in his chosen profession came swiftly. From assistant city counselor of St. Joseph he advanced to assistant prosecuting attorney, assistant attorney-general of Missouri, chairman of the state public service commission, assistant solicitor-general of the United States, and, on April 25, 1925, at the age of forty, by appointment of President Coolidge, a federal district judge, the youngest federal judge in the country.

Otis, J., was the author of widely-publicized opinions dealing with the constitutional issues of the early New Deal. He handed down pioneer decisions holding the N. R. A. unconstitutional (*United States* v. *Sutherland*, 9 F. Supp. 204) and upholding the P. W. A. (*Missouri Utilities Co.* v. *City of California, Mo.*, 8 F. Supp. 454). He denounced the National Labor Relations Act (*Stout* v. *Pratt*, 12 F. Supp. 864) but he sustained the Frazier-Lemke Act both in its original form and as later amended (*In re Jones*, 10 F. Supp. 165; *In re Bennett*, 13 F. Supp. 353). When the Kansas City political machine of T. J. Pendergast was brought to task in federal court on election fraud charges Judge Otis presided, and it was he who sentenced Boss Tom to the federal penitentiary.

The vibrant voice, eloquent diction and sparkling personality of Judge Otis made him one of the most popular public speakers in the legal profession, much sought after for bar association addresses. Similar qualities make his writings among the most readable in legal literature. A few quotations will demonstrate the point:

"As the last word fell from his almost foaming lips, he snatched up from the table the two sets of instructions which had been read and, carefully placing those given for the plaintiff uppermost, handed them to that strongest man on the jury who seemed to him most friendly to his cause—whom thereby he placed in nomination for the post of foreman." 27 J. Am. Jud. Soc. 172.

"Although I live in Kansas City I still vote in St. Joseph. I always thought that if I voted in St. Joseph there would be some chance that my vote would be counted—once, at least." 27 J. Am. Jud. Soc. 173.

"Some day a reformer may appear who will seek to have forbidden comment on the evidence by the lawyers in a case. He will say, perhaps, or he will jabber—a man that idiotic probably could only jabber— '. . . the jury will not do equal justice unless comment by counsel is prohibited.'" 25 J. Am. Jud. Soc. 182.

"The suggested interpretations of the commerce clause do violence to its essential purpose and ignore its background. But as new wine may be put into old bottles despite the ancient warning, so new interpretations of constitutional provisions sometimes may be maintained if the language used in them will support at all the new interpretations." *U. S.* v. *Sutherland*, 9 F. Supp. 204, 209.

"The individual employee is dealt with by the act as an incompetent. The government must protect him even from himself. He is the ward of the United States, to be cared for by his guardian even as if he were a member of an uncivilized tribe of Indians or a recently emancipated slave." *Stout* v. *Pratt*, 12 F. Supp. 864, 867.

"The law of the case must be accepted by us. And we accept it, not grudgingly but cheerfully; not in letter but in spirit also; not as one who is driven against his will, but as one upon whom a great light has broken, so that the scales have fallen from his eyes. What has been declared in this very case by the Court of Appeals to be the law *is* the law of the case, subject to an exception we shall consider hereafter." *Hoffman v. H. O. L. C.*, 55 F. Supp. 453, 454.

One summer day when the light docket at Joplin had been exhausted, Judge Otis entered the following formal court order:

"It is directed, ordered and decreed that at high noon Thursday, June 15, the following officials, to wit: Harry Spaulding, Bill Caster and Louis Shaw, do absent themselves from the United States Court House at Joplin and betake themselves to some limpid Missouri stream, and there, equipped with all necessary paraphernalia, tempt, catch, seize and capture choice representatives of the finny tribe. It is ordered that they continue diligently in the aforesaid pursuit from high noon until the going down of the sun and even thereafter. Failure to comply faithfully with this order will result in the most serious consequences. So ordered."

Nationwide press dispatches told of the Judge's death only two days before Christmas, and a few days later smilingly reported how the funeral in the small Baptist church at Hopkins, Mo., had been carried out in accordance with his detailed instructions, even to the requirement that the mourners "sing lustily."

Said Albert L. Reeves, his associate on the bench:

"He gave his life to the establishment of justice, and his brilliant record will light the way for those of us who remain and for others who will come hereafter."

Law and Administrative Government

DAVID A. SIMMONS

THE PROFESSOR OF LEGAL HISTORY in the University of London, writing in the dispassionate and scholarly style of the true historian, describes in the following language a crisis in common law history at a time when lawyers were called "serjeants":

* * * "The serjeants from the beginning held a high place in the legal world; we soon find Parliament referring hard questions to the serjeants as well as to the judges, and quite early in the fourteenth century the Crown adopts the policy of recruiting the bench from the outstanding men at the bar. * * *

"The courts of Equity—Chancery, Star Chamber, Court of Requests—were differently organized. The permanent clerical establishment of each of these courts undertook the duties of attorneys, and so professional attorneys had no place there. Still, there remained numerous duties of a quasi-legal character which had to be done, and litigants soon found it convenient to have a sort of law agent who would set the complicated machinery in motion by engaging and conferring with the various branches of the profession as occasion required, and doing other duties, sometimes of a legal and sometimes of a business character. * * *

"The rise of new courts and the extension of the jurisdiction of old ones had far outgrown the limits within which the serjeant cared to act * * * Indeed, the position of the law had changed considerably under the Tudors. Justice was no longer the exclusive concern of judges and serjeants * * * It was now an affair of state requiring constant attention from the Crown which was viewing with some anxiety the activities of its courts. * * * There was a chance of the Crown turning to the civilians for exponents of a newer technique of law and government; but in the end a sort of compromise was worked out. * * * The law was brought once more into vital contact with the world of affairs and politics. That contact was necessary if the law was to continue as a growing system, but the dangers were of the gravest, as the history of the Stuart judiciary will show."

Professor Plucknett (*Concise History of the Common Law*, 2nd ed., 1936) there presents a parallel with the present situation in the United States, except that the result of the situation here still hangs in the balance. New institutions have been created, each with its "permanent clerical establishment" in which attorneys are said to have a dubious place. Justice, if such this form may be called, has again become "an affair of state." There has been more than a little "turning to the civilians for exponents of a newer technique of law and government."

Indeed, the struggle of which the distinguished historian speaks is more than a parallel, for it was a part of the tradition out of which America was born. That was not only the period when the legal institutions of what is now the English-speaking world were reaching their modern form, but the period when the American colonies were founded.

One needs but to re-read the Declaration of Independence and the twenty-seven paragraphs of indictment against the King and Parliament to have a very clear picture of what to them constituted tyranny. We have become so accustomed to thinking of the Declaration of Independence only in the terms of its grand pronouncements as to life, liberty and the pursuit of happiness that we are prone to overlook the very practical aspects of that document which defined the grievances of the colonies and of the individual citizens caused by the arbitrary and unbridled exercise of power by King and Parliament.

Among other things, it charged (a) that the King had made judges dependent upon his will alone; (b) that he had created a multitude of new offices and had sent hither swarms of officers to harass our people and eat out their substance; (c) that he had combined with others to subject us to a jurisdiction foreign to our Constitution, unacknowledged by our laws, and contrary to the forms of our government; (d) that he had deprived us in many cases of the benefits of trial by jury; (e) that he had altered fundamentally the forms of our government; and (f) that King and Parliament has suspended our own legislatures and had declared themselves invested with power to legislate for us in all cases whatsoever.

The author is a member of the Houston, Texas, bar, president of the American Bar Association, and past president of the American Judicature Society.

Those were charges that were said to justify a revolution, and there are those who now say that the same acts of tyranny in modified form have appeared among us again. I am perfectly willing to let each thoughtful person reason out the comparison for himself, but I believe most of us will agree that bureaucracy, with its absorption of all powers of government, is in violation not only of the spirit of this country as expressed in the Declaration of Independence, but is in violation of the very letter of our Constitution. Certainly our form of government is now entirely different from anything envisioned by the founders.

The problem today, of course, concerns no usurpation or oppression from afar. The question is whether surrender shall come from within, as so well stated in the seventh and eighth chapters of First Samuel:

"And Samuel judged . . . And he went from year to year in circuit . . . Then all the elders . . . came to Samuel . . . and said unto him, '. . . Now make us a king to judge us like all the nations.' But the thing displeased Samuel, when they said, 'Give us a king to judge us.' . . . And he said, 'This will be the manner of the king that shall reign over you . . . Ye shall be his servants. And ye shall cry out in that day because of your king which ye shall have chosen you . . .' Nevertheless the people refused to obey the voice of Samuel; and they said, 'Nay; but we will have a king over us; that we also may be like all the nations . . .'"

Though history, whether legal or biblical, usually speaks in terms of kings, the point is always arbitrary government. Samuel's people, short-sightedly weary of the effort required in democratic government, wanted to be "like all the nations." The Tudors and the Stuarts, and the House of Hanover, which lost America for England, in order to free themselves from the restraints of law championed what Professor Plucknett rationalizes as "a newer technique of law and government."

Nothing indicates that these urges will not remain so long as men inhabit the earth. The question at any time is whether enough people with enough intelligent vigor remain to preserve the gains of law over insidious and multiform despotism. Today arbitrary power, as the concomitant of either war or political philosophy, rules the greater part of the world. Indeed, most of its peoples have never known a different governance.

THE AMERICAN EXPERIENCE

At the close of the eighteenth century a constitution was adopted creating the United States, in which it was expressly provided that a Congress of elected representatives would do the legislating for the nation and a system of independent courts of law would supply the necessary judicature. With the advent of the twentieth century both legislation and judicature, with mounting frequency, have been combined with executive powers in a non-representative and non-judicial arm of government called "administrative." That this is a Second Revolution in American government is not denied by its partisans, who not only advocate these institutions and stoutly defend them but, like the Tudors and the Stuarts, wage unremitting war against the supremacy of law.

It has been said that neither court nor administrative agency "should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice." *United States v. Morgan*, 307 U.S. 183, 191 (1939). But on the law-making side Senator Connally, the present chairman of what is now and for some time to come will be the most important legislative committee in the world, has said that in placing "transcendent powers" in administrative agents, "the Congress seemingly has divested itself of its own judgment and its own discretion and its own legislative wisdom" (79 Cong. Rec. 11156).

Administrative government is one of the great facts of our time. Reaction to it takes many forms. There are those who refuse to recognize it as legitimate, though its proponents point out that revolutions, like monarchies, create their own legitimacy. There are those who find no praise too high for it, although in other affairs they would be the first to deplore such an extreme. There are those who study it to an infinity of words and documentation, though it is no new phenomenon. And then there are those who assay the more arduous task of fitting it into our institutions in such a way as to preserve their free nature without preventing government from achieving

its present-day purposes. Let us see what has been or may be done in support of this latter attitude.

In the 1920's the problem of administrative government was treated in terms of judicial review—that is, the relations of administrative agencies to courts—whereas we now know that mere court review is sterile where Congress confers unlimited discretion. Senator George, during the debate on the war contract renegotiation bill, called it "arbitrary" legislation (Cong. Rec., Jan. 21, 1944, p. 588). Special administrative courts were once suggested by a committee of the American Bar Association (S. 1835, 73rd Cong. 1st Sess.; S. 3676, 75th Cong. 3rd Sess.; 58 A.B.A. Rep. 203, 426 (1933); 59 A.B.A. Rep. 539 (1934); 60 A.B.A. Rep. 136 (1935); 61 A.B.A. Rep. 220, 233, 721 (1936)) and by the minority of the Attorney General's Committee on Administrative Procedure (Senate Document No. 8, 77th Cong. 1st Sess., pp. 203-209 (1941)). In 1937 the President of the United States recommended a comprehensive plan for the separation of judicial and prosecuting functions in administrative agencies. He stated that the present form of administrative tribunal, which performs "administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the constitution" (*Report of the President's Committee on Administrative Management, with Message of the President and Special Studies*, 1937). So far as these proposals mean a trial *de novo* by an independent tribunal on the order of the Board (now Court) of Tax Appeals, they are a solution of only the problem of the judge-prosecutor combination found in administrative agencies. Special courts have at least four disadvantages: (1) because they are specialized, they are subject to the pulling and hauling of special private and governmental interests; (2) they weaken the jurisdiction of the regular courts of the land with which citizens are familiar and to which they are accustomed to resort for justice; (3) there is more to the problem than mere separation of judge and prosecutor, for the judge must have some law to apply, which he does not have so long as administrative powers are conferred in practically unlimited terms; and (4) courts can exercise only powers of adjudication and hence furnish no solution for the increasingly serious problem of administrative rule-making typified in general price, wage, rate, and food regulations.

More recently, legal thought has turned to matters of procedure, in some part, perhaps, as a result of the movement for the revision and uniformity of rules of procedure in the federal trial courts. An administrative procedure act was passed by Congress but vetoed by the President (Walter-Logan Bill, H.R. 6324, 76th Cong. 3rd Sess.; House Doc. No. 986, 76th Cong. 3rd Sess.). Meanwhile, the Attorney General of the United States in 1938, as a part of the movement for reform of judicial procedure, recommended that attention be turned to the procedure employed by the administrative process; and the President authorized a thorough and comprehensive study of existing practices and procedures with a view to detecting deficiencies and pointing the way to improvements (Senate Doc. No. 8, *supra*, pp. 251-252). Pursuant thereto, the so-called Attorney General's Committee on Administrative Procedure, after elaborate studies, made its report in 1941 (Senate Doc. No. 8, *supra*). The Senate held hearings on the legislative proposals growing out of the work of that committee (Hearings, *Administrative Procedure*, on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess.), but suspended consideration with the imminence of war. The current World War, however, has been more than an interruption, for it has given us further experience with administrative agencies and has increased the awareness of administrative government on the part of every citizen and every group or interest. We believe we now know more than we did when the Walter-Logan Bill was drafted or when the Attorney General's Committee reported.

It has recently become common to approach administrative government by a method of search and publicity. The search is for shocking cases of "bureaucratic" government. The publicity feeds undiscriminating appetites for public scandal. A little thought will demonstrate, however, that such investigations have a limited usefulness so far as maintaining orderly legal processes are concerned. Of course, legis-

lative investigations have an assured place in all matters of government, but, as the Senate Small Business Committee has so well put it (89 Cong. Rec. 5411, 5412):

"We, the Congress, cannot examine into individual cases or regulations beyond what is necessary to determine whether parties should have legal protection. Our function, once we are satisfied that the conditions so require, is to pass laws not only so that administrators may have power under them, but also in order that the people may have the protection of those laws. . . . Laws without enforceable rights are a mirage. Administration without or beyond the law is doomed to failure. . . . The way to make it workable is to grant the necessary powers to the administrators and the necessary rights to those who are regulated, including the means of protecting those rights in any administrative or judicial proceedings."

LEGISLATIVE NEEDS

The immediate lines of approach are necessarily legislative, and it seems clear that they must take two separate but related courses. First, there must be an administrative procedure act. Second, Congress must—as it now seems firmly to recognize—more specifically state and limit the powers which it has delegated to administrative agencies. The latter is essential in order that jurisdiction may be understood by both the regulators and the regulated. The former is equally essential to furnish the regulators and regulated with a basic blueprint of methods of operation and means of control.

An administrative procedure statute, such as is proposed in the widely supported McCarran-Sumners Bill (S. 7 and H.R. 1203), must have three principal features: (1) It must provide for publicity of administrative law and procedure. (2) It should differentiate and state at least the minimum requirements of the two types of administrative action, rule making and the adjudication of particular cases. (3) It must specify and simplify the methods of judicial review. In addition, two further matters are desirable: a statement of the incidental procedural rights, such as those relating to appearances or investigations, and express limitations upon the sanctions which administrative agencies may impose. Within each of these different items there is, of course, much room for inclusion and exclusion. There is a minimum beyond which such legislation may not be reduced, and this seems to be about the position taken in the McCarran-Sumners Bill. Additional and tempting features to add to such a measure there surely are, but wisdom dictates against any proposal which may sacrifice fundamentals for detail.

If both an administrative procedure act and a more precise definition of administrative powers can be secured, at least we will be assured of some measure of law in administrative government. But that need not and should not end efforts at further improvement. Some functions of the agencies should be recaptured by the Congress and some function should be returned to the ordinary courts.

Congress should recapture its legislative power even in the fields of lesser federal legislation. If necessary, it could act through its own Bureau of Legislation working under the immediate direction, supervision and control of the Congress and its various committees. The congressional establishment has only a few thousand employees to assist the ninety-six senators and four hundred and thirty-five Congressmen. If Congress does not have the time nor the means to investigate and draft all the subordinate rules and regulations needed to supplement its acts, it can certainly take out of the executive departments and the administrative agencies the people engaged in composing, writing, and expertizing these minor laws. It is estimated that there are thousands of these. If they functioned as part of the congressional establishment, they would have a legislative *esprit de corps* and a broad general outlook on legislative problems distinct from that of "bureaucrats" anxious to expand their own authority. Certainly the draftmanship of all rules and regulations would become more uniform and more consistent with the spirit of our institutions.

Congress should also give thought to returning judicial functions to the ordinary courts. Why not create a system of minor federal courts similar to that of the states and cities, with jurisdiction in controversies arising under minor federal regulations? Of the uncounted thousands now exercising judicial functions in the bureaus and commissions, those who are qualified might well be placed under the courts as masters, commissioners and examiners, where they would properly become a part of

the judicial establishment and have the outlook, impartiality, and *esprit de corps* of the judge. They could be localized throughout the country in federal court houses and thus be available for the prompt hearing of complaints involving the thousands of minor governmental regulations.

At some time this nation will surely stand, without knowing it, at a crossroads which point one way to freedom and order and the other way to bondage and chaos. Many people cite good reasons for saying that the day of choice is at hand. If we pass blindly on, we may find ourselves so used to bargaining rather than adjudication, and so accustomed to politics rather than legal administration, that we will neither recognize nor appreciate a government according to law. This is not said in a spirit of legal isolationism. The antidote for arbitrary power is not a struggle against all power—to the point of depriving governments of the means to govern and protect. *Dictatorship* v. *Anarchy*, though delusively opposite and conveniently simple labels, are extremes and not alternatives. They currently stand for things which are equally opposed to that "government under law" which the civilized world has sought for more than 2000 years and has occasionally achieved. We have achieved it here on this continent, and the issue is whether we shall retain it or see it frittered away, bit by bit, as expediency and indecision dictate.

The Michigan One-Man Grand Jury

GLENN R. WINTERS

THE MICHIGAN LEGISLATURE passed in 1936 a measure known as the chain banking bill, permitting banking corporations to establish branch banks throughout the state. One such bank was organized and now exists with offices in a half-dozen Michigan cities. Independent banking interests have looked with apprehension on this extension of the "chain store" principle to banks, and in several recent legislatures an "anti-chain banking" bill has been introduced. Opposition to the passage of this bill has been vigorous, with much newspaper publicity, and lobbyists for and against it have haunted the legislative chambers and hotel lobbies of Lansing.

Early in 1943 the Detroit Citizens League forwarded to Attorney-General Herbert J. Rushton evidence tending to indicate that some of the lobbyists had stooped to questionable methods of persuasion, and that some legislators had been found receptive. After some delay the attorney-general filed a petition in the Circuit Court for Ingham County asking for a grand jury investigation of alleged graft and corruption in the legislature. The investigation, begun in August of 1943, is still in full swing, and has brought to light conditions that have amazed and shocked the people of Michigan and have made newspaper headlines throughout the country. Lobbyists and legislators, past and present, have confessed to the giving and taking of bribes in connection with the banking bill and other pending legislation, notably an oft-introduced measure intended to regulate and give legal recognition and standing to chiropractic and certain other alleged healing arts known collectively as naturopathy. Indictments have reached into the state's highest political circles, and the legislature, stimulated by an aroused public opinion, has appropriated $150,000 for the completion of the investigation.

In many respects this grand jury is similar to any that might be called in any other state. A special prosecutor heads a staff of some fifteen investigators, who bring in clues and evidence on the basis of which witnesses are summoned and interrogated before the grand jury, and indictments are returned as the grand jury sees fit, all proceedings being conducted with traditional grand jury secrecy. The distinguishing feature of this particular grand jury is that it does not consist of twenty-three men, or the smaller number permitted in some jurisdictions, but of just one man and that man a judge. The Honorable Leland W. Carr, judge of the Ingham

The author is assistant secretary-treasurer of the American Judicature Society, and editor of the JOURNAL.

County Circuit Court, sits alone as a "one-man grand jury."[1]

The one-man grand jury has been a part of the Michigan legal system for more than a quarter of a century. The current investigation may turn out to be its greatest undertaking, but it has figured in three other big cases—the prosecution of "King Ben" Purnell, leader of the House of David religious colony at Benton Harbor twenty years ago on charges of immorality; investigation of a fraudulent recount of votes in the 1934 election in Wayne County; and the extensive investigations by Judge (now Senator) Homer Ferguson beginning about five years ago into graft and corruption in Wayne County public offices. It has so completely taken over the entire field of criminal investigations, great and small, that the conventional grand jury, though still available under Michigan law, has practically disappeared from the state.

The text of the one-man grand jury statute is given in full in a footnote.[2] In substance it provides that any judge, including police judges and justices of the peace, on complaint of any person, sworn or unsworn, may use the subpoena, the power to punish for contempt, and the power to grant immunity from prosecution as a result of incriminating testimony, in an investigation of suspected crime, and may cause the apprehension of any persons who as a result of such investigation appear to be guilty of crime, for further proceedings the same as upon formal complaint. The act is a part of a section entitled "Proceedings for the Discovery of Crime." The rules regarding secrecy of testimony are declared to be the same as for grand jurors, and the similarity of the whole procedure to grand jury proceedings led the newspapers to coin the phrase "one-man grand jury" a few years after the passage of the act.[3]

BACKGROUND AND HISTORY OF THE STATUTE

As far back as 1885 a Michigan statute establishing the Detroit police court gave inquisitorial powers to police justices in words from which the one-man grand jury statute was obviously copied.[4] The origin of the institution in its present form may be traced back to a Com-

1. Wm. P. Lovett, "One-Man Grand Jury in Action," 33 Nat'l Municipal Review 292 (June, 1944).

2. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground for removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witness during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court. *Provided,* that if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by the justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. Mich. Stats. Ann., Sec. 28.943-6.

3. The first official reference to a "one-man grand jury" appears in *People v. Doe,* 226 Mich. 5 (1924).

4. P. A. 1885, Act 161, Sec. 20.

mittee on Law Reform of the Michigan State Bar Association, headed by Judge Chester L. Collins of Bay City, in 1915. That committee recommended the appointment of a special Committee on Criminal Law and Criminal Procedure to report back at the next meeting, and at the suggestion of Judge Collins the chairmanship of the special committee went to Walter S. Foster, Lansing attorney, who as Ingham County prosecutor had recently secured the conviction of the state treasurer on charges of embezzlement, using a twenty-three-man grand jury.

The Foster committee first considered a broad revision of criminal procedure, but, lacking time and facilities for such a project, it concentrated its efforts on a few specific improvements, the first of which was proceedings for the discovery of crime. The text of the bill later introduced and passed appears in the 1916 report of that committee,[5] along with an introduction from which the following paragraphs are quoted:

"In his *History of the Criminal Law* Sir James Fitz James Stephen says: 'It is singular that with the law as to coroners in full operation since 1276, no duties of the same sort should have been imposed on the justices of the peace appointed forty-eight years afterward in 1324.' It is no less singular that in our present Michigan statutes under the head of 'Proceedings for the Discovery of Crime,' the sole provisions relate to coroners' inquests.

"The preliminary examination before a justice, the first statutory authority for which was in 1554, appears to have been intended to serve the purpose of an inquest for the discovery of crime. It was literally an 'examination' of the accused wherein he and other witnesses were questioned to expose and detect the crime. But by the time of the adoption of our own system of preliminary examinations, the English plan which we followed had evolved from an inquest for the discovery of crime into a proceeding in the nature of a preliminary trial of a particular individual, leaving us no model for any proceeding to serve the purpose of the original inquest except the grand jury, which in this state is called only under extraordinary conditions."

SIMILAR STATUTES IN OTHER STATES

The idea of a judicial inquiry into the commission of crime is very far from being unique to Michigan law. The following states now have, or have formerly had, something closely resembling though not identical with the Michigan statute:

South Dakota—"Whenever a complaint verified positively or upon information and belief by the attorney-general, state's attorney or city attorney is laid before any magistrate that a criminal offense has been committed in this state and asking for an investigation of the same, such magistrate shall use his subpoena requiring every person he may deem proper to attend before him at the time and place mentioned in such subpoena and submit to an examination and give testimony concerning any violation of law about which he may be questioned."

The witness is required to swear to his testimony as reduced to writing, and the magistrate is given power to issue a warrant for the arrest of whatever person appears to be the offender, for further proceedings according to law.[6]

Connecticut—This state offers what is probably the oldest example of transfer of grand jury powers to judges. In 1731, more than two hundred years ago, the Connecticut legislature passed "An Act Requiring the Justices, Grand Jurors, etc. in every Town in this Colony to meet together twice a Year, to advise what may be more proper to suppress Vice and Immorality."[7] From that statute was taken a later law limiting the inquests to grand jurors, but in 1895 it was amended to give power to conduct an inquisition to the justices of the peace residing in any town or any three of them, with subpoena power and the power to punish for contempt.[8] A 1941 statute empowers the superior courts on their own motion to institute an "investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed" before any judge of that court or a state referee, with subpoena and contempt powers expressly given. Secrecy of testimony is to be governed by order of the court.[9]

Vermont—Judges of county and municipal courts may conduct an inquest into any matter under investigation by the state's attorney, but only upon his written application. Testimony is under oath and secret except on order of

5. Proceedings, Michigan State Bar Association, 1916, p. 103.

6. Laws, 1907, c. 200, Sec. 1; S. D. Code, 1939, Sec. 34.0901.

7. Laws, 1731, c. 70.

8. P. A. 1895, c. 274. The legislative history of these statutes is reviewed in *McCarthy v. Clancy*, 110 Conn. 482 (1930).

9. Conn. Stats., Supp. 1941, c. 334, Sec. 889f. See 26 J. Am. Jud. Soc. 79 (1942) for an instance in which this procedure was used to advantage.

supreme or county court. Subpoena power is given.[10] Special provision is made for inquests by justices or municipal judges in cases of suspicious death[11] and fires.[12]

Oklahoma—Investigation may be conducted by any judge of a court of record on written request of the county attorney or sworn complaint of any other person, in cases of violations of liquor and gambling law only.[13] Subpoena and contempt powers are expressly given. Special judges may be appointed for the purpose. The Oklahoma appellate courts have not been very friendly to these statutes, holding them inapplicable to district judges on jurisdictional grounds,[14] holding that the duties imposed "are for the most part ministerial" and not judicial,[15] and holding that although the statute positively declares that upon the presentation of findings by the judge the county attorney "shall" prepare an information, the court is without power to compel him to proceed if he refuses to do so.[16]

Wisconsin—The words "John Doe Proceedings" are part of the title of Section 361.02 of the Wisconsin statutes, but the text deals only with preliminary examinations before a magistrate. That some judicial inquiry into the commission of crime is practiced in Wisconsin under this statute appears from the following statement by the attorney-general:

"When it becomes necessary to take testimony in the course of a criminal investigation, this is usually done through John Doe proceedings under Sec. 361.02 of the Wisconsin Statutes. For a complete discussion of the procedure see *State ex rel. Long* v. *Keyes*, 75 Wis. 288, 44 N.W. 13. To a certain extent such proceedings which are held before a magistrate are accorded the same protection of secrecy as are grand jury proceedings, at least to the extent that the accused is not entitled to an inspection of the testimony taken."[17]

Arizona—This state's criminal code is a copy of the American Law Institute model, and does not specifically provide for judicial inquiry into the commission of crime. Very recently, however, a judge of the Superior Court, in cases involving embezzlement of public moneys, held investigation proceedings in chambers and called witnesses and took their testimony by official reporter in private, with attorney-general, county attorney and state examiner present, and after being satisfied of the sufficiency of the evidence to justify the issuance of warrants, held the regular preliminary hearing and held defendants to trial in the superior court. The court's opinion used the words "John Doe complaint" referring to the start of the case. Other proceedings of a like nature were held in a case involving two persons charged with bribery of the same officials. Certain objections and motions to quash the informations were denied. The procedure, therefore, evidently is on a usable basis in Arizona whatever its statutory authority may be.[18]

Oregon—"Under our procedure a proceeding may be inaugurated upon the complaint of any person before a justice of the peace, and a warrant may issue upon probable cause. If the defendant is not known, he is proceeded against as John Doe."[19] It is not unlikely that this much could be said of numerous other states.

In *Kansas, Montana* and *Utah* provisions similar to that of Oklahoma, dealing primarily with liquor law enforcement, once existed but have been repealed.[20] Of interest in this connection is an Idaho statute providing for very similar proceedings with power to administer oaths and subpoena witnesses, but held not by a judge but by the Director of Enforcement of the Department of Law Enforcement.[21] A recent New Jersey statute gives county detectives and investigators attached to the prosecutor's office the power to administer oaths in relation to

10. Stats. 1917, Sec. 6617, amended P. A. 1921, c. 207; P. L. 1933, Sec. 8149-55.
11. P. L. 1933, Sec. 8144-6.
12. P. L. 1933, Sec. 8147-8.
13. Okl. Stats. 1941, Tit. 37, Sec. 83; Tit. 21, Sec. 951.
14. *Ex parte Gudenoge*, 2 Ok. Cr. 110 (1909).
15. *Ex parte Ballew*, 21 Ok. Cr. 105 (1921).
16. *Kirkpatrick v. Retail Merchants Ass'n of Tulsa*, 140 Okla. 118, 282 P. 668 (1929).
17. Letter from William A. Platz, attorney-general, Nov. 16, 1944.
18. Information furnished by Joe Conway, Attorney-General, and Thomas J. Craff, Assistant Attorney-General, letter, Nov. 20, 1944. The case mentioned was *State v. Melczer and Kroloff*, Superior Court, Maricopa County, No. 17678-1, information filed Aug. 5, 1944.
19. Letter from George Neuner, Attorney-General, citing Oregon Comp. Laws, Ann., Vol. 9, p. 245.
20. Mont. Rev. Codes (Choate, 1921), Sec. 11109, repealed by Initiative Measure No. 30, p. 603, Laws, 1927. Kansas R. S. Ann., 1923, c. 62, Sec. 301 (gambling, liquor, or any offense where the accused is a fugitive from justice); Utah C. L. 1917, Sec. 3374. These provisions are not in the current Kansas and Utah statutes.
21. Laws, 1943, c. 175, Sec. 1107.
22. Laws, 1939, c. 276, Sec. 1, p. 697; R. S. 41:2-1.1, 1938-40 Supp., p. 403. Sustained, *State v. Barts*, 33A. (2d) 838, 846 (1944).

matters involving violation or attempted violation of the criminal laws of the state.[22]

SOME MICHIGAN INVESTIGATIONS

Although a close approximation to the Michigan one-man grand jury is thus seen to exist or have existed in a dozen of the states (and the Montana repeal, incidentally, was merely a part of a repeal of state liquor laws and not a rejection of this institution as such), it has reached its greatest development in Michigan. No official records are kept of the number of one-man grand jury investigations in the state or in any county. Walter S. Foster, chairman of the committee that drafted the act, recently estimated that the average would probably be fifty a year, perhaps one from each county.[23] A review of the cases that reached the supreme court will give some idea of the scope and variety of one-man grand jury investigations in the past twenty-eight years if not their exact number.

The first one was *People* v. *Willson*, 205 Mich. 28 (1919). This was a relatively minor investigation begun on February 11, 1918, less than a year after the enactment of the statute, before a justice of the peace in Oakland County to ascertain whether or not the treasurer of Royal Oak township had kept fraudulent books. At about the same time a judge of the Recorders Court of Detroit conducted an investigation of alleged graft in the Detroit water board. *Oakman* v. *Recorder of Detroit*, 207 Mich. 15 (1919). In 1921 a Grand Rapids judge investigated charges of malfeasance against the mayor of Bay City, particularly with respect to alleged lack of enforcement of the state liquor laws. *Mundy* v. *McDonald*, 216 Mich. 444 (1921).

The first big case to attract attention was the House of David investigation in 1923. The Israelite House of David is a religious colony at Benton Harbor, known chiefly for the luxuriant beards of its unshaven male members, and especially for its picturesque bearded baseball team that has toured the county fairs of the United States for a generation. Presiding genius of the colony was one Benjamin Franklin Purnell, familiarly known as "King Ben," who had proclaimed himself as the "Seventh Angel Messenger" who "comes with the Seventh Key to unlock the mysteries of godliness." At the Benton Harbor colony, established in 1903, the "elect of Israel" were to be "gathered together and their bodies prepared to receive the Kingdom of God."

A disillusioned family from Ohio who sold their all, turned over the proceeds to Ben and moved into the colony in 1912, filed suit in federal court in Grand Rapids for their money and property back, and in the course of the testimony it became evident that part of the preparation of the bodies of the female members of the colony to receive the Kingdom of God was to engage in immoral practices with King Ben. The full story is told in *Hansel* v. *Purnell*, 1 F. (2d) 266 (1924).

Public interest was aroused by this case, and by subsequent cases containing charges of seduction and rape and counter-charges of slander and conspiracy. The attorney-general filed a petition for an investigation under the 1917 act to determine the nature and extent of criminal activities in the colony, and Judge Harry J. Dingeman of Detroit, presiding circuit judge of Michigan, conducted it. So far as the House of David was concerned, this investigation did not accomplish much. Purnell disappeared and the tabloids of a dozen midwestern states joined in a man-hunt. Michigan politics became involved in the case, and when Purnell was finally found he was not prosecuted. The significance of the case so far as the one-man grand jury is concerned, was the occasion it offered the Supreme Court of Michigan to hold the statute constitutional and, ironically enough, send Walter M. Nelson, Detroit attorney who had started the whole thing by filing the *Hansel* case, to jail for contempt of court. This case, *People* v. *Doe* and *In re Nelson*, 226 Mich. 5 (1924), will be discussed at length hereinafter.

In November, 1934, Orville E. Atwood defeated Guy M. Wilson for secretary of state by a narrow margin. Members of the defeated party questioned the count, a special session of the "lame duck" legislature was convened in December, and a committee was appointed to conduct an investigation of the election and report back. That committee selected certain Detroit precincts and conducted a recount of the ballots, at the conclusion of which they announced that Wilson had gained 13,774 votes —enough to win the election for him. The legislature thereupon declared Wilson elected,

23. Letter, Oct. 25, 1944. He had no figures available, and this should be considered merely a random guess.

but the supreme court found the entire legislative proceedings out of order for parliamentary reasons and sustained Atwood's tenure.[24] Early in January a committee of the new legislature made an investigation of the investigation, as a result of which Judge Thomas M. Cotter of the Detroit Recorders Court conducted a one-man grand jury investigation of the recount, on petition of the attorney-general. Testimony and evidence assembled indicated the grossest sort of fraud in the recount, and thirty-two of the participants were arrested and tried on informations filed by the attorney-general, fifteen of whom were convicted. These included prominent political leaders of Detroit and members of the legislature, and their convictions were sustained by the supreme court.[25]

THE FERGUSON GRAND JURY

In August, 1939, Detroit police found an automobile containing the bodies of a woman and child dead of carbon monoxide poisoning. Suicide notes left by the woman told of widespread corruption in public offices, one of those accused having been the woman's lover. Newspapers played up the story and William E. Dowling, assistant prosecuting attorney, began immediate investigation of the charges in the absence of his superior, Duncan C. McCrea, on a trip to Florida. McCrea hastened back to Detroit and ordered the investigation stopped at once, explaining publicly that his office did not have the time and facilities for it. An appeal to Mayor Richard W. Reading was answered with high-sounding assurances but no action. Finally, seven private citizens, members of the Detroit Citizens League, took advantage of the one-man grand jury law and filed a petition in the Wayne County Circuit Court for a one-man grand jury investigation. The court received the petition *en banc*, granted it and assigned Judge Homer Ferguson to the job. For more than two years Judge Ferguson, assisted by a special prosecutor and staff, devoted his full time to the investigation. A vast network of gambling and vice operating under official protection was uncovered. Mayor (ex-mayor by that time) Reading, Prosecutor McCrea, Sheriff Thomas C. Wilcox, and a host of lesser officials, vice operators, go-betweens, etc., were indicted, tried and convicted and are now serving prison sentences. More than 5,000 witnesses were interviewed, and the number of indictments totalled 360. Shortly after the conclusion of the investigation, which had much favorable publicity, Judge Ferguson resigned from the bench and ran for the United States Senate, where he is serving today.[26]

EXAMPLES OF SMALLER INVESTIGATIONS

Two or three minor investigations in the early history of the one-man grand jury have already been mentioned. In 1937 Judge Gadola of the Genesee County Circuit Court presided over an investigation into a secret criminal organization known as the "Black Legion" operating in and around Flint. For a period of nearly two years Circuit Judge George W. Sample of Washtenaw County has been presiding over investigation and prosecution of gamblers in the vicinity of the Willow Run bomber plant, using the one-man grand jury for the purpose.[27]

THE REASON FOR THE ONE-MAN GRAND JURY

The grand jury is an ancient institution, dating from the "inquisitio" of the Frankish kings, before the Norman Conquest, when a body of neighbors was summoned and asked under oath various questions regarding the conduct of royal affairs in the vicinity, including the keeping of the peace. In that connection, they were required to tell what they knew and suspected regarding murders, robberies and other crimes.[28] When kings became oppressors, as occurred later on in England, the grand jury stood between them and the people as a protection against unfounded prosecutions. These two separate functions survive in the grand jury of today—to prevent reckless and ill-advised prosecutions by certifying to what is known as "probable cause" as a prerequisite to further criminal proceedings against an individual, and to investigate alleged or suspected violations of law when no particular offender

24. *Wilson v. Atwood*, 270 Mich. 317 (1935).

25. *People v. O'Hara*, 278 Mich. 281 (1936).

26. Much of the story is told in *People v. McCrea*, 303 Mich. 213, 6 N. W. 2d 489 (1942). See also a long series of articles by John D. Boettcher, a state's witness under a grant of immunity, in the *Detroit News*, throughout the month of January, 1944, and an article "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (Aug., 1942).

27. The Gadola case is reported in *People v. St. John*, 284 Mich. 24 (1938). Other examples are related in an article by Pliny W. Marsh, "Michigan's One-Man Grand Jury," 8 J. Am. Jud. Soc. 121 (1924).

28. 1 Pollock and Maitland, *History of English Law* 120 (1895).

can be named and perhaps not even a particular offense.

As for the first of these, the report of the Cleveland Foundation Survey of the Administration of Criminal Justice states:

"It is no longer needed as a bulwark of our liberties, as the trial courts and juries, together with other community institutions, are quite capable of protecting us against executive tyranny or prosecution. Generally, the grand jury does little more than rubber stamp the opinion of the prosecutor. It is almost exclusively dependent upon him for its knowledge of the law, and for its information on the facts it is almost entirely dependent on his zeal and willingness."[29]

There is nothing improper in the prosecutor playing such a role, and many of the states have simply eliminated the grand jury's part in all or most criminal proceedings, allowing the prosecution to be initiated on an "information" issued by the prosecutor instead of an "indictment" issued by a grand jury.[30]

Many people, however, including the Cleveland authority just quoted,[31] favor the continuation of the grand jury as an inquisitorial agency. The grand jury investigation is still very much a part of American criminal justice, and as this is written a New York grand jury is uncovering startling conditions in the legislature and judiciary at Albany.[32] Even in its investigative function, however, the last sentence quoted from the Cleveland report is all too true. Instances are on record where grand juries have proceeded on their own initiative even in spite of opposition from the prosecutor,[33] but it is not an unfair generalization to say that the same inherent weaknesses that make the grand jury depend on the prosecutor in the making of presentments make it lean the same way in the conduct of criminal investigations. Newspaper reports indictate that the current Albany investigation is largely the work of Special Prosecutor George P. Monaghan.

The off-hand solution to that problem would be to pass the investigative function of the grand jury over to the prosecutor the same as the indicting or presenting function. In many states where the grand jury has fallen into disuse that is approximately what has happened. A difficulty arises, however, in that effective grand jury investigations require the exercise of certain powers, including power to subpoena witnesses and require the production of books and papers, the power to punish for refusal to answer questions or for false and evasive answers, and the power occasionally to grant immunity from prosecution as a result of incriminating testimony, which never have been and doubtless never should be entrusted to an official such as a prosecuting attorney. As has been well stated by Professor John B. Waite,[34] the one-man grand jury is a device to modernize, simplify and render more efficient the inquisitorial function of the grand jury just as the substitution of the information for the indictment has done for its accusatory function.

ADVANTAGES OF THE ONE-MAN GRAND JURY

That the one-man grand jury is just such an improvement over older methods of inquisition, the highly successful Michigan experience over a period of more than a quarter of a century clearly shows. In the first place, a one-man institution is more flexible, less unwieldy and cumbersome than one composed of twenty-three or any number greater than one. Vital to the extraordinary success of the Ferguson investigation in Detroit was the ability of Judge Ferguson, devoting his full time to the work, to meet a witness at any convenient place, at any convenient time, without waiting for twenty-two other men. In addition to his regular offices, Judge Ferguson maintained a secret suite on the nineteenth floor of the National Bank Building, and at various times had as many as two other secret meeting-places or "hideouts" as they were dubbed by the newspapers, where timorous witnesses could give their testimony with a minimum risk of recriminations from those against whom they testified.[35] That he succeeded in gaining the confidence of prospective witnesses was indi-

29. *Criminal Justice in Cleveland*, pp. 211-212 (1922).

30. See Miller, "Informations or Indictments in Felony Cases," 8 Minn. L. Rev. 379, reprinted 8 J. Am. Jud. Soc. 104 (1924).

31. "There will always be instances in which the inquisitorial powers of the grand jury are necessary for the initial discovery or proof of a violation of law. * * * At times it is needed to institute inquiry into the acts of public officials themselves." *Ibid.*, p. 212.

32. See the *New York Times*, especially during the early part of November, 1944, when the story was frequently on the front page.

33. Cases from Minnesota, Illinois and New York are cited in Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 Yale L. J. 687, 698 (1932).

34. Interview, October, 1944.

35. *Detroit News*, Sep. 8, 1941. On Jan. 11, 1945, a key witness in the Carr investigation was murdered. He had declined a bodyguard.

cated by the many volunteers throughout the investigation, and especially when he announced it was drawing to a close.[36]

In this connection, the following comment by Walter S. Foster, previously quoted, is pertinent:

"It is doubtful if anyone who has not handled a 23-man grand jury appreciates its limitations. Actually, it is very seldom an investigative body, but considers only testimony presented by the prosecuting official, and probably not one in a multitude do any real investigating. This is not a surprising result, for the jurors have other affairs of their own which need attention and are not in a position to pursue an investigation over a long period. It is unthinkable that such a jury would patiently work for a year the way Judge Ferguson did, or as Judge Carr is now doing. With one man conducting the investigation, he may recess for any time deemed advisable by him, whether it be one day or many weeks, during which period investigators can make a satisfactory check, and then he may convene and sit for a half day or an hour and recess again until more testimony is available. Such procedure would be impossible for a large jury from scattered homes."[37]

Brisk dispatch of business, prompt decisions, freedom of action, and the ability to take advantage of sudden "breaks," are characteristic of the one-man grand jury to an extent never possible in a group of from thirteen to twenty-three men.

The one-man grand jury has a further advantage in concentration of responsibility. Anyone who has ever served as chairman of a committee knows that the usefulness and participation of the individual members run in inverse proportion to their number. Praise for a successful twenty-three man investigation diffused among the twenty-three does not warm the heart of any one of them very much, while censure for failure may always be shifted to the other twenty-two. Both of these powerful incentives to accomplishment are at their best when centered on one person.

A third major advantage of the one-man grand jury is the possibility and likelihood of having the investigation in skilled and expert hands. Not all judges are trained investigators, of course, but the strictly investigative features of the work are not part of the judge's function anyway. The judge will be, however, trained in the criminal law and in the art of dealing with witnesses and suspected criminals. John Boettcher, one of the state's witnesses in the Detroit case, told a *Detroit News* reporter:

"Judge Homer Ferguson and Chet O'Hara, his special prosecutor, are hard guys. They gave me many unpleasant hours. I haven't any malice. They had a job to do and they did it. When they turned their blast on me I found out they knew their way around. Before the grand jury went into action it seemed that our set-up in the Reading administration was perfect. But Ferguson and O'Hara found the loopholes."[38]

And again,

"I simply got caught. The Ferguson-O'Hara grand jury put me in a vise, turned the handle hard, and squeezed the truth out of me."[39]

Judge Van Buren Perry of Aberdeen, South Dakota, a circuit judge of many years' experience, comments as follows regarding the practical effectiveness of the closely analogous South Dakota procedure:

"The statute is a useful one in this: When the state's attorney wishes to make it impossible for witnesses thereafter to recede from or change their story, he immediately swears out a John Doe proceeding and the witnesses are dragged in forthwith, their statements are taken, reduced to writing, signed and sworn to. This freezing of the testimony is often of the utmost value. The statute is also useful in cases where public rumor has charged an offense and the state's attorney wishes pretty definitely to know whether or not there is enough evidence obtainable to warrant a prosecution. The proceedings are secret, sudden, and the name of the suspect is not disclosed. It is therefore, a very valuable tool in the hands of one who is disposed to use it."[40]

In Michigan it is never necessary to await the opening of a scheduled grand jury term. Prompt, vigorous action, on a hot trail, are possible when the wheels of grand jury procedure may be set in motion at any time by any judge.

The *Detroit News* in an editorial on August 23, 1939, commenting on the debate that preceded the decision to use a one-man grand jury instead of the twenty-three man grand jury that could have been called, summarized the arguments for the one-man jury as follows:

"A one-man grand jury can command greater public confidence than even an ideal twenty-three man grand jury is likely to command, since the latter must divide responsibility among twenty-

36. *Detroit News*, Sep. 12, 1941. See 26 J. Am. Jud. Soc. 42 (1942) for further details and comment.
37. Letter, Oct. 25, 1944.
38. *Detroit News*, Jan. 24, 1944.
39. *Ibid.*, Jan. 3, 1944.
40. Letter, Oct. 28, 1944.

three. Thus the councilmen referred to answer their own criticism. A twenty-three man grand jury can do nothing that a one-man grand jury cannot do, and being less expert, less economical, and less responsible, it might do less."

OBJECTIONS CONSIDERED

The arguments against the one-man grand jury center around the contention that it imposes non-judicial duties on a judge. The Supreme Court of Michigan has consistently rejected this, although until recently not in a very convincing manner. In *Mundy* v. *McDonald*[41] a one-man grand juror was sued for libel and the Supreme Court denied recovery on the basis of judicial privilege, saying:

"That defendant acted in a judicial capacity cannot, we think be questioned. What he did, he did as a circuit judge."

No cases were cited, and no argument offered beyond the sentences quoted. The question there arose only in that incidental manner, and the constitutionality of the statute was directly challenged for the first time in a case arising out of the House of David investigation. Walter M. Nelson, attorney for the plaintiffs in the federal case that started the whole proceedings[42] was summoned as a witness before the grand jury, and declined to give certain information regarding his clients on the basis of attorney-and-client privilege. One half of the supreme court agreed with him on this point and remarked as to his other five contentions, the first of which was the unconstitutionality of the statute:

"In our view of the case a disposition of the second of these contentions will make it unnecessary to discuss the other propositions."[43]

The other half of the court agreed with the trial court that the defendant's acts constituted contempt and went on to decide the other points adversely to him, affirming his conviction by an equally divided court. The court's entire discussion of the constitutionality of the statute occupies seven and one-quarter lines in the middle of page 18 of the opinion. It reads as follows:

"1. The objection to the constitutionality of the act under which the examination was held is that it confers non-judicial duties on circuit judges. This objection is answered by the case of *Mundy* v. *McDonald* (with citations), where we said:

" 'That defendant acted in a judicial capacity cannot, we think, be questioned. What he did, he did as a circuit judge.' "

Mundy v. *McDonald* and *People* v. *Doe* have been the foundation of all the court's subsequent holdings of constitutionality, in none of which, until 1945, was there further discussion of the point.[44]

A NEW YORK PRECEDENT

A comparable question arose in New York in 1927 under a statute empowering the governor to designate a judge to take evidence and report back to him with recommendations in any proceeding for removal by him of a public officer.[45] The case of *Matter of Richardson* arose out of an investigation of charges against the president of the Borough of Queens by Mr. Justice Townsend Scudder of the Supreme Court undertaken by direction of the governor of the state. The judge retained special counsel, associate counsel, consulting engineers, accountants and other staff members, rented offices, and plunged into the job.

"Witnesses were subpoenaed to attend before Judge Scudder in aid of the preliminary investigation and were examined in his presence after being placed under oath. Counsel for the accused official was denied the opportunity to be present, and denied a transcript of the minutes or other information as to the substance of the testimony. The depositions of witnesses procured by the judge under the compulsion of a writ were treated as equivalent to the office notes of counsel, memoranda for private use in prospective litigation. They were not embodied in a public record subject to public scrutiny or to inspection by opposing counsel. They will never be so embodied except in so far as it may happen that their contents will hereafter be repeated at the hearing.

"A preliminary investigation thus restricted," said Judge Cardozo, "is not a hearing by a judge. It is a search by an inquisitor."

Further on, Judge Cardozo continues in forceful words which the staunchest friend of the one-man grand jury can hardly deny are not wholly inapplicable to it:

"The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county he would do no more and no less. What he learns is not

41. 216 Mich. 444, 20 A.L.R. 398 (1921).
42. *Hansel v. Purnell*, 1 F. (2d) 266 (1924).
43. *People v. Doe*, 226 Mich. 5, 7 (1924).
44. *People v. Wolfson*, 264 Mich. 409 (1933); *People v. St. John*, 284 Mich. 24 (1938).
45. C. L. Ch. 47.

committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. *Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work.*"[46]

Other authorities in support of this view are to be found. Says the Supreme Court of Oklahoma:

"The duties devolving upon the judge in these special proceedings are for the most part ministerial and not judicial. The legislature might have delegated the power to the mayor of the city, to some notary public or to some other officer."[47]

Professor Edson R. Sunderland, distinguished authority on legal procedure in the University of Michigan Law School, has termed the one-man grand jury an "anomaly," and says that such an office, if allowed to exist, should be attached to the attorney-general's department "since its functions are inconsistent with the impartiality which ought to characterize the judicial office."[48]

WHAT IS A JUDGE SUPPOSED TO DO?

In appraising the various viewpoints on this subject, it is well to reflect upon just what is the scope of the judicial function. Hearing and deciding cases is certainly the center and substance of it, but who will say that all else is *ultra vires* to a judge? As remarked by Judge Leland W. Carr,[49] the man presiding over the current investigation of the Michigan legislature, a great part of every court's time is occupied with such non-judicial matters as the hiring and firing of janitors and stenographers, redecoration of the courtroom, etc. In Michigan, vacancies in the elected office of prosecuting attorney are filled by appointment of the circuit judge. A broad view of the court's powers must be taken to avoid falling into manifest absurdity.

Bouvier's Law Dictionary gives under the heading of "Judicial Power" many examples of powers and duties conferred upon courts at one time or another and held to be without or within the judicial power. Upheld as appropriate work for courts have been such tasks as the appointment of city commissioners,[50] to establish towns,[51] and to fix the salary of a county attorney.[52] Disapproved[53] were statutes requiring judges to review qualifications of county officials before appointment,[54] to appoint a commission to act as supervisor of elections,[55] and to decide whether the question of granting liquor licenses should be submitted to the voters.[56] Many more examples of each are available.

Without attempting to reconcile all the cited cases, we cannot help but agree with Judge Carr's opinion, as expressed in the interview from which he was previously quoted, that the best term to describe adequately the work of the judge is the *administration of justice.* Lawyers themselves are officers of the courts in the furtherance of this broad objective, and if the acts of the judge fit into a reasonable and practicable pattern directed to that end, they are not, or should not be, *ultra vires.*

That is not to say that the judge could not easily step out of his proper part. Professional detectives are a part of the essential equipment of a large-scale investigation such as that at Lansing, but if Judge Carr were to play Hawkshawk with bloodhound and magnifying glass he would certainly be assuming a non-judicial role. That is about the view Judge Cardozo took of the New York procedure in *Matter of Richardson,* but Michigan one-man grand jury investigations have not thus far been conducted that way. Judge Carr sits on the bench, in his courtroom, and witnesses are questioned by a prosecutor before him, with the judge ruling on the propriety of the questions asked, deciding whether or not an answer to a question would compel a man to testify against himself or to incriminate himself, committing witnesses for contempt for refusing to answer or answering falsely, and engaging in other indisputably judicial acts. That is the substance of the part

46. 247 N Y. 401, 407 (1928). Italics added.
47. *Ex parte Ballew,* 21 Okla. Cr. 105 (1921).
48. Interview, Jan. 13, 1945.
49. Interview, Dec. 18, 1944.
50. *City of Terre Haute v. R. Co.,* 149 Ind. 174, 37 L.R.A. 189 (1897).
51. *Morton v Woodford,* 99 Ky. 367, 35 S.W. 1112.
52. *Rockwell v. County of Fillmore,* 47 Minn. 219, 49 N.W. 690.
53. Some of these citations are from the brief of William Henry Gallagher, counsel for petitioner in *In re Slattery,* discussed *infra.*
54. *Abbott v. McNutt,* 22 P. (2d) 510 (Calif.).
55. *Supervisors of Election,* 114 Mass. 247.
56. *Board of Supervisors v. Todd,* 97 Md. 247.

he plays, and incidental duties of a different kind cannot alter its essentially judicial nature.

Although courts may do many things not strictly judicial, none but a court may exercise the contempt power.[57] The number of cases in which the Supreme Court of Michigan has sustained the exercise of the contempt power in these proceedings[58] indicates how important it is to the success of the work. The same may be said of the power to grant immunity—a strictly judicial function.[59] No official investigating agency attached to the executive or legislative departments without these powers could be as effective and useful as the one-man grand jury is with them.

The Supreme Court of Michigan is not alone in sustaining this sort of procedure against arguments based on separation of powers. The Supreme Court of Errors of Connecticut, in a very well-considered opinion by Maltbie, J., in 1930 held as summarized in an official headnote:

"The legislature has the right to impose upon justices of the peace powers and duties of an administrative nature, such as the power to investigate crime in the statute under consideration; and committing to the same magistrates the judicial function to act when confronted with the refusal of a witness to testify is equally lawful and does not constitute a denial of due process of law to them."[60]

The Supreme Court of the United States denied certiorari to McCrea and other defendants in the Ferguson investigation, on consideration of briefs in which the one-man grand jury procedure was fully described. 318 U. S. 783 (1943).

The last word on the constitutionality of the one-man grand jury in Michigan has come from the Supreme Court of Michigan since the foregoing paragraphs were written. Francis P. Slattery, vice-president of the chain bank against which the anti-chain banking bill was directed, was sentenced by Judge Carr to sixty days in the Ingham County jail for contempt for reluctance and evasiveness in his answers to questions regarding his activities as a lobbyist against the bill. On petition to the Supreme Court for writs of habeas corpus and certiorari, the constitutional question was briefed and argued more fully than ever before in the history of the statute. The petitioner relied heavily upon *Matter of Richardson.* The Michigan court, while paying tribute to Cardozo's "characteristically learned and lucid style," admits it is "much impressed but not bound by the opinion." It distinguishes the New York case on the ground that the duties there considered were directly delegated to the judiciary by the executive with no other object than to report back findings to the governor, and also that the Michigan constitution differs from that of New York in making the circuit judge a conservator of the peace.[61] The court says that because of the importance of the question it has reexamined it with care, and it then reviews its own previous decisions on the subject. With respect to *People* v. *Doe* it states that the disagreement within the court was "not as to the constitutionality of the act, but whether defendant, an attorney, was obliged to disclose information which he claimed was confidential." The wording of that opinion does not bear out such an analysis. The exact words of the dissenting half of the court were:

"In our view of the case a disposition of the second of these contentions will make it unnecessary to discuss the other propositions."

Not another word was said by them about the other propositions, including the constitutional question, and it is very hard to see how those words can be construed to mean that they agreed with the prevailing opinion on the other propositions.

The court, however, then proceeds to settle the question in Michigan for once and for all by declaring (after reviewing the rest of the Michigan cases):

"So that there may be no further question, we hold that the judge conducting a one-man

57. *Hale v. State,* 55 Ohio St. 210, 45 N.E. 199, 36 L.R.A. 254; *Wyatt v. People,* 17 Colo. 252, 29 P. 961, and other cases cited in *Bouvier,* p. 1749.

58. *People v. Doe,* 226 Mich. 5 (1924), *People v. Wolfson,* 264 Mich. 409 (1933), *In re Watson,* 293 Mich. 263 (1940), *People v. Bommarito,* 270 Mich. 455 (1935); *In re Wilkowski,* 270 Mich. 687 (1935), *In re Schnitzer,* 295 Mich. 736 (1940), *In re Ward,* 295 Mich. 742 (1940), *In re Cohen,* 295 Mich. 748 (1941) and others.

59. "By giving immunity to this one man, the grand jury and the courts were able to convict many. The benefit going to Boettcher by giving him immunity was many times returned by the services he rendered the community by his confessions and testimony." *Detroit News,* Jan. 29, 1944, quoting Judge (then Senator) Ferguson.

60. *McCarthy v. Clancy,* 110 Conn. 482 (1930). See also, *State v. Daniels,* 38 S. D. 81, 160 N. W. 723 (1916), upholding the constitutionality of the South Dakota statute.

61. Art. 7, Sec. 18.

62. *In re Slattery,* — Mich. —, — N. W. —, No. 42,917, Oct. term, 1944, decided Jan. 4, 1945. Opinion by Butzel, J.

grand jury proceeding is acting in a judicial capacity."[62]

ABUSE OF THE GRAND JURY PROCESS

The second major argument against the one-man grand jury is the possibility of its abuse by an arbitrary, high-handed and tyrannical judge. Walter M. Nelson of Detroit, principal in the contempt action of *People* v. *Doe*, may be excused for having strong feelings in opposition to it, having spent thirty days in jail as his contribution to the judicial history of the statute. "The one-man grand jury and personal liberty," says Mr. Nelson, "cannot exist together."[63]

There have been unconfirmed accusations and charges, some of which have reached the newspapers, of the use of third degree methods in the Ferguson investigation in Detroit. One of the most popular of these was the story that a certain witness was dangled by his heels from a seventeenth-story window until he lost consciousness.[64] Another witness is supposed to have had his teeth knocked down his throat in an effort to get him to give the desired testimony. In this connection, the statements of John Boettcher, previously quoted, that Ferguson and O'Hara were "hard guys," that they "gave me many unpleasant hours," and that they "put me in a vise, turned the handle hard, and squeezed the truth out of me," are not without some significance, although there is nothing in those words that necessarily indicates more than thorough-going, relentless, determined and effective examination of witnesses. Writing as he did at that time, Boettcher could hardly have been expected to say more, regardless of what they had actually done.

In addition to the constitutional question in the *Slattery* case, the petitioner denied that there was any contempt, and the briefs indicated that the contempt holding was predicated upon Slattery's claimed inability to recall a particular conversation with a particular legislator in which that man indicated he was willing to change his vote on the bank bill "for a consideration." The Supreme Court justices were plainly doubtful about this particular lapse of memory, but the argument is not without force that there is room for the exercise of arbitrary power where a man may be sent to jail because of his insistence that he does not remember one of several hundred similar incidents that the prosecutor and grand jury want him to remember.

A further danger, though not of serious proportions, is indicated in a warning by the Supreme Court of South Dakota in a 1911 opinion that the South Dakota statute "cannot be resorted to to obtain evidence for use in a civil suit growing out of a transaction constituting a criminal offense."[65] The New York Court of Appeals, twenty-two years before the *Richardson* case, foreshadowed it in an opinion condemning the use of a subpoena naming no defendant but merely reciting that the magistrate has "reason to suppose an offense has been committed and for the purpose of investigating whether it has been committed," and remarked:

"The danger of prosecuting before a magistrate without any legal proof is apparent when the subpoena in question is read, as it calls for all journals, day books, order books, blotters, ledgers, checks, check books, stub books, bank pass books, letters, copies of letters, etc., covering a period of nine years. In addition, it calls for various contracts made by parties shown to be interested in pending litigation with a party whose counsel was also counsel for the complainant. No business secret would remain unknown if such a command were obeyed. The subpoena was suggestive of private ends and furtive aims."[66]

Whether or not the particular charges here suggested were founded or unfounded, the reality of this danger cannot be ignored. There is in the inquisitorial process, backed up by such powerful weapons of compulsion as the grand jury possesses, an inequality of situation between the inquisitor and the witness that requires some sort of safeguard to prevent the inquisitor from taking advantage of the man who stands helpless before him. "Inquisition" is itself an unpleasant word, and the opprobrium that attaches to it springs largely from the horrible stories of the "Spanish Inquisition" of the Middle Ages, when religious fanatics knew no restraint in their search for heretics.

The twenty-three man grand jury constitutes a fairly good safeguard against unfair and tyrannical practices. Human nature has not sunk so low that twenty-three men, chosen as grand jurors are chosen, can be expected to agree to do wrong. However, as has been previously mentioned, the twenty-three are not in

63. Telephone interview, Jan. 6, 1945.
64. *Detroit News*, ————, 19—.
65. *In re Johnson*, 27 S. D. 386, 131 N. W. 453.
66. *People ex. rel. Livingston v. Wyatt*, 186 N. Y. 383, 392, 79 N. E. 330 (1906).

close touch with much of the work of the prosecutor who builds the case up before them. In their absence, the self-restraint of the prosecutor is the chief protection of the witness, and lacking that, it is not hard to imagine that he could arrange to have his way in dealing with witnesses without the knowledge of the grand jury.

Is there no safeguard in the one-man grand jury? Judges are of all kinds, good and bad, and a scheming judge and prosecutor could doubtless arrange to have their own way for a time, but few and far between are the judges who are not upright, honorable, high-minded, and possessed of a fitting sense of decorum and of the high responsibilities of judicial office. The integrity of the judiciary is as adequate a safeguard against the taking of unfair advantage and unreasonable action in a one-man grand jury as any other safeguard under any other system. If that much cannot be said for the judiciary of a state, then the entire administration of justice in that state will break down and remain so until the standards of the bench are restored to their proper level.

Another argument frequently encountered in attacks on one-man grand jury investigations is that it is unconstitutional to bring a man in as a witness, compel him to tell his story, and then indict him. This is alleged to be in effect compelling him to testify against himself. This hardly deserves discussion here, for there is nothing about it that is peculiarly characteristic of the one-man grand jury. The very same question would arise if a twenty-three man grand jury should question a number of witnesses and then indict some of their number. It is perhaps a tribute to the effectiveness of the one-man grand jury that it has been so often raised in cases arising therefrom.

The question was considered by the Supreme Court of South Dakota in a case arising in 1929 under the John Doe statute of that state. In proceedings styled against John Doe, the suspected culprit was brought in as a witness, and a case against him having been made out of his own testimony, his name was substituted for that of Joe Doe. The court refused to sanction this procedure, but it remarked:

"We do not mean to say that a proper and legitimate use of Section 4504 can in no case be made. It can properly be employed if an effort is being made in good faith to determine whether or not a crime has been committed and if so by whom. For example, if a prosecuting attorney or a magistrate is advised that an automobile has been stolen and the owner has no idea by whom it was taken, it may be perfectly proper under those circumstances to file a complaint against John Doe, alleging the larceny and requesting an investigation, and proceed to conduct an investigation under Section 4504. And if as a result of such investigation it appears that larceny was committed by William Smith, a warrant may issue for his arrest, and a subsequent indictment or information against him would not be vitiated by the fact, if it so happened, that he was called and testified as a witness in the John Doe proceeding without having been advised of his constitutional rights, providing at the time he was so called he was not under suspicion of the larceny in such fashion that it should be said as a matter of fact that the investigation was then primarily upon the question of his guilt or innocence."[67]

There are no Michigan cases in which a one-man grand jury indicted a man already under suspicion as was the defendant in the above case, on his own testimony, but the Michigan court has uniformly sustained indictments and convictions in spite of the fact that the defendants had previously testified as witnesses. To hold otherwise would be in effect to grant an "immunity bath" to every witness. This would no doubt be a very effective way to gather evidence, but there would not be much point in gathering it if nothing could be done with it.

To justify the one-man grand jury it is not necessary to deny all merit to all of the arguments against it. There is no man so rich that his account does not contain a few liabilities as well as assets. His solvency is determined not by the existence or non-existence of liabilities but by the comparison between liabilities and assets. Surely the advantages of the one-man grand jury procedure far outweigh anything that has yet been said against it. As Kim Sigler, special prosecutor for the Carr grand jury, pointed out, the state prison at Jackson is full of men of proven guilt, paying the penalty for wrongs that would have gone unpunished except for the work of the one-man grand jury.[68]

WHAT'S IN A NAME?

A comparison of the extent and success of judicial investigations of crime in Michigan and in the other states where they are available indicates that one would not be entirely unjus-

67. *State v. Smith*, 56 S. D. 238, 259 (1929).

68. Interview, Dec. 18, 1944.

tified in saying that the popularization of the catch phrase "one-man grand jury" has had a great deal to do with their further development in Michigan.

As previously mentioned, that phrase is an entirely unofficial nickname coined about the time of the House of David investigation in 1923. It is frequently referred to as a "misnomer," but there is nothing misleading about it, it gives a clear idea of the nature of the institution, and has been used freely and exclusively in briefs, opinions, and everywhere else, even by those who apologize for it. The Michigan Supreme Court, in the *Slattery* opinion, declares that in spite of some people calling it a "misnomer," the term is descriptive and will be used by the court. The time will come when the apologies will be discontinued.

It is merely a historical accident that a trial jury should be termed "petit" and an accusing jury "grand." Neither one is more grand or more petty than the other. The words "grand jury" ring grandly, however, and suggest the majesty of the law and solemn proceedings dealing with important matters.

While big investigations have doubtless been carried out under the South Dakota statute, an examination of the reported cases and available evidence indicates that the hypothetical case of the stolen automobile given in the *Smith* case just about represents the view of the South Dakota bench and bar as to the possibilities and usefulness of "John Doe proceedings." If there and in other states the judicial investigative machinery were known as a grand jury, the attitude of bench and bar might well be altered to the extent of taking greater advantage of it.

THE WORDING OF THE STATUTE

More important, however, are vital differences in the wording of the statutes. Michigan one-man grand jury investigations may be initiated upon the filing of any complaint, which may be upon information and belief, and there is no limitation as to who may file it. The big Detroit investigation was started on a complaint signed by private citizens after public officials later shown to be involved in the crime had refused to take action. In South Dakota, proceedings may be started only on complaint of the attorney-general, state's attorney or city attorney, and must be sworn to. Says Judge Perry:

"In this respect I think the statute is weak. There have been occasions when we have had very weak state's attorneys, sometimes with little or no experience, who have not been active in investigating or vigorous in prosecuting criminal offenses. There have been occasions when I would have liked the authority to initiate proceedings. Sometimes the state's attorney is unwilling to start anything. The only way by which an unwilling state's attorney can be forced into a prosecution is for the judge to call a grand jury, and that often is not at all effective if the state's attorney will not present evidence to the grand jury and the grand jury should happen to be composed of men who are unable to get the evidence for themselves."[69]

The Vermont statute is similar to that of South Dakota with respect to initiation of proceedings, but the Connecticut statute goes even farther than Michigan. It begins:

"When it shall appear to the Superior Court in any county that the due administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of that court or a state referee."[70]

From these words it is clear that the court would not even need to wait for the filing of a complaint, as in Michigan, but could act on the basis of a newspaper dispatch, an anonymous telephone call, or any other kind of tip that satisfied the judges that an investigation was needed.

Again, someone will protest that such action by the court is non-judicial. This argument, in the last analysis, is part of the "sporting theory of litigation." If a judge is a mere judicial umpire calling balls and strikes, it is of course out of order for him to take any affirmative action on his own motion. If, however, the court be looked upon as an institution created by the people and charged by them with the responsibility of administering justice in the community, there is nothing incongruous in arrangements making it unnecessary for the court to sit idly and helplessly by in the face of conditions crying out for the application of law and justice, until somebody else gives it a starting push. It would be an improvement on

69. Letter, Oct. 28, 1944.

70. Stats., 1941 Supp., p. 440.

the Michigan statute if it were amended in this respect to conform to the Connecticut procedure.

The inquisitorial power is vested in Michigan in "any justice of the peace, police judge, or judge of a court of record." In South Dakota it resides in "any magistrate;" in Connecticut in judges of the Superior Court and, on order of that court, state referees, who are retired judges. In Vermont it is in judges of county and municipal courts. The South Dakota provision is probably the equivalent of that of Michigan. It seems desirable to have the power widely diffused. Only a judge of outstanding abilities can make a success of a big project such as the Lansing and Wayne County investigations, but the advantages of the procedure in minor cases as described by Judge Perry of South Dakota warrant making it available to every judicial officer having jurisdiction in criminal cases.

All of the four states mentioned give the judge power of subpoena. Also important to the successful operation of the procedure in Michigan have been the power to punish for contempt and the power to grant immunity. These should be included in any one-man grand jury statute.

Court Reorganization in Maryland

WILLIAM C. WALSH

AT THE ELECTION held on November 7, 1944, the voters of Maryland adopted a constitutional amendment designed to improve the judicial system of the state, and particularly directed towards strengthening the Maryland Court of Appeals, which is the State's highest court.

The adoption of the amendment represents the first change made in Maryland's judicial system since that system was established by the Constitution of 1867. Most of the provisions of the amendment had been advocated from time to time by various State Bar Association committees, and by others, beginning in 1908, but for one reason or another, these proposals did not even reach the legislature until 1941, and the amendment which proposed them that year failed of passage by a narrow margin. However, the supporters of the reorganization of the courts felt encouraged at the splendid showing made in the 1941 legislature, and at the annual meeting of the State Bar Association held in the summer of 1941, a resolution was passed asking Governor Herbert R. O'Conor to appoint a commission to study the entire judiciary article of the state constitution with a view to recommending improvements in it.

The Governor, who had strongly supported the movement in the 1941 legislature, complied with this request by appointing a commission of leading lawyers and judges, with the late Carroll T. Bond, then Chief Judge of the Court of Appeals, as chairman. Taking its name from the chairman, the Bond Commission recommended a reorganization of the Court of Appeals, the abolition of the Orphans' Courts of the state, the consolidation of the clerks' offices of the various courts in Baltimore City, and various other changes. An interim report, which included the proposals for the reorganization of the Court of Appeals, was approved at the annual meeting of the State Bar Association held in June, 1942, and the state Democratic platform of that year approved the proposals in principle.

In the fall of 1942, Judge James Clark of Ellicott City, then president of the State Bar Association, appointed a committee of the Association to sponsor the recommendations of the Bond Commission at the 1943 session of the Maryland legislature. When the session opened early in January, 1943, bills proposing constitutional amendments to carry out the various recommendations of the Commission were introduced, and after a long and spirited fight the Court Reorganization Bill, somewhat modified by the Legislature, received the three-fifths vote required in each House for the approval of such bills, but the bills dealing with the Orphans' Courts and the Clerks of Court in Baltimore City did not pass.

The Court Reorganization Amendment was submitted to the people of the State at the November, 1944 election, was adopted by a vote of almost two to one, and by its terms became effective January 1, 1945.

Mr. Walsh is a member of the Cumberland, Md., bar, and attorney-general of Maryland, and was chairman of the State Bar Association committee that sponsored the project.

To understand and appraise the changes made, it is necessary to set out the judicial system established by the constitution of 1867. That constitution divided the state into eight judicial circuits, one comprising Baltimore City, which now contains about half the population of the state, and the remaining seven circuits comprising from two to five of the state's twenty-three counties outside of Baltimore City. The constitution provided a Supreme Bench for Baltimore City, which now consists of a chief judge and ten associate judges, and provision was also made for an additional judge from Baltimore City to be specially elected to sit on the Court of Appeals. In the counties, the judges of each circuit consisted of a chief judge and of two or three associate judges, some circuits having two and others three associates, and the chief judge of each county circuit also became a member of the Court of Appeals. The chief judges in the counties performed all customary *nisi prius* work in their circuits, and they also sat as members of the State's highest Court. This Court thus consisted of one judge from Baltimore City, who had no *nisi prius* work, and of the seven county chief judges, who performed both *nisi prius* and appellate work.

For more than thirty-five years leading lawyers and judges throughout the state had felt that this system was antiquated and placed our Court of Appeals at a disadvantage in comparison with the highest courts of nearly all the other states, and among the reasons urged for a change were the following:

1. In over forty states of the union the judges of the highest court perform no *nisi prius* work, and in only two, Maryland and Delaware, do such judges perform every kind of *nisi prius* work as part of their regular duties.

2. Baltimore City contains half the population of the state, and has over two thousand lawyers, while the counties as a whole contain less than seven hundred lawyers, and the average number in each county circuit is slightly less than one hundred. Under the old system one judge of the Court of Appeals was selected from the more than two thousand lawyers in Baltimore City, while seven members of the court were selected one each from the seven county circuits, in the smallest of which there are now only seventy lawyers, and none of which contain more than one hundred and thirty lawyers. Furthermore, in recent years more than sixty per cent of the cases in the Court of Appeals have come from Baltimore City, while less than forty per cent came from the counties. Some of the greatest Maryland judges have been county men, but despite this it was obvious that the selection of one judge from a pool of more than two thousand lawyers, and the selection of seven other judges from pools averaging less than one hundred lawyers each would not normally furnish the State's highest Court with the best possible judicial talent.

3. Based on the volume of the court's work in recent years, it was thought that if all the judges of the Court of Appeals were relieved of *nisi prius* work, five judges instead of eight would be sufficient, and it was also thought desirable to have an uneven number of judges on the court so as to avoid an even division of opinion among the judges, a result which, though infrequent, sometimes occurred.

4. Under the old system many appeals were taken from decisions of chief judges in the circuits, and while a chief judge whose decision was appealed did not participate in the case in the Court of Appeals, it was necessary for his associates on that court to pass judgment on his decision. This was embarrassing and was not thought to be wise.

5. Under the old system there was no real head to the judicial system in Maryland, each judge being supreme in his own circuit, with no one charged with the duty of seeing that the administration of justice was efficiently carried on throughout the state. Neither was there any power to assign judges from one circuit to another, so that in cases of sickness or other disability of several judges in one circuit there was no way to furnish judicial help to the remaining judge or judges.

Under the amendment adopted last November it was provided that there shall be five judges on the Court of Appeals, and that none of these judges shall perform *nisi prius* work, unless specially assigned to such work by the chief judge in cases of emergency. Two of the judges are to come from Baltimore City, and three from the counties, and the twenty-three counties are divided into three appellate circuits with one judge coming from each district. These changes relieve the appellate judges of

lower court work, except in cases of emergency, they enable two of the judges to be selected from the pool of more than two thousand lawyers in Baltimore City, and they more than double the pools of lawyers in the counties from which the three remaining judges are to be selected.

To avoid displacing any judge who had been elected to the Court of Appeals prior to the adoption of the amendment, it was provided that any elected judge should continue to serve on the Court of Appeals until the expiration of his term, and as five county members of the court had been elected to the court at the time the amendment was adopted, these five remain as members. The judge from Baltimore City serving when the amendment was adopted had been appointed to fill a vacancy and will hold office under this appointment until the state election in 1946. The additional judge from Baltimore City provided for by the amendment has also been appointed, so that at present there are seven members of the Court of Appeals, two being from Baltimore City and five from the counties. Two of the elected county judges were from appellate districts which had no other members on the Court of Appeals, and these two judges automatically became regular members of the Court of Appeals. The three remaining elected county members of the court all came from the same appellate district, and the amendment provided that the governor should designate which one of these three should become a regular member of the court. The remaining two are termed additional judges, and they are to continue both as judges of the Court of Appeals, and as chief judges of their respective circuits until the expiration of the fifteen year terms for which they had previously been elected. Both of these additional judges will reach the retirement age of seventy in the next six or seven years, and hence it will be six or seven years before the membership of the court is actually reduced to five, but it will be reduced to this number when these judges retire, because the amendment provides that no other judges are to be elected to the Court of Appeals in their places.

The two county members of the court who had been appointed to fill vacancies until the state election in 1946 were, on January 1, 1945, automatically removed from the court by the amendment, and they also lost their positions as chief judges of their respective circuits. Both, however, have been appointed as associate judges in their respective circuits, the effect of the amendment having been to create a vacancy for an associate judge in each of these circuits. The result was that the amendment was put into effect without returning any judge to private life.

The amendment also provides that the chief judge of the Court of Appeals should be the administrative head of the judicial system in Maryland, with power to require reports from all the other judges, and to generally supervise the administration of justice throughout the state. The chief judge is also given authority, subject to such rules as the court may adopt, to assign judges from one circuit to another in cases of emergency, to assign circuit judges to sit as members of the Court of Appeals in similar cases, and to assign judges of the Court of Appeals to work in the circuits when such action seems necessary or advisable.

It is believed by those who favored the changes that their adoption will eventually lead to substantial improvement in the courts of the state, particularly in the Court of Appeals, and it is significant that Mr. Charles Markell, for many years one of the leading lawyers of the state, has accepted the appointment as the additional member of the court from Baltimore City. It is also to be observed that while the changes were recommended by a commission appointed by Governor O'Conor, a Democrat, and the amendment proposing the changes had the urgent support of the governor and of his administration, leading Republicans throughout the state likewise supported the amendment. Notable among these were Honorable D. Lindley Sloan, now retired, who succeeded Judge Bond as Chief Judge of the Court of Appeals, and Honorable Morris A. Soper, former Chief Judge of the Supreme Bench of Baltimore City, and now United States Circuit Court Judge in the Fourth Circuit, both of whom prepared pamphlets supporting the amendment and made public addresses favoring its adoption.

In conclusion, it seems fair to say that the State Bar Association bore the burden of the fight. Its efforts were supported by the National Lawyers' Guild of Baltimore City, by the Women's Bar Association of Baltimore City, by the Monumental Bar Association of Baltimore City, which is an association of colored

lawyers, by the Baltimore City Bar Association, by some of the County Bar Associations, and by numerous civic and organized labor groups, and generally by the press throughout the state, particularly the Baltimore Sun, but the State Bar Association was the real leader. The movement was initiated by that Association, all the members of the Bond Commission, which drafted the proposals, were members of that Association, and special committees of the Association sponsored the bill in the Legislature, and also conducted a public campaign for the adoption of the amendment at the election last November. The successful outcome of these efforts shows the contribution which bar associations and other public spirited groups can make towards improvements in the administration of justice. It also serves to demonstrate that once the people are convinced of the wisdom of a proposed change they will approve it, even though the change requires the reorganizing of a judicial system, which had been embedded in the state constitution for more than three-quarters of a century and which, despite its faults, had served the people well.

New York Judicial Selection Campaign Resumed

THE PROBLEM OF improving the method of selecting New York judges, a live issue in the Empire State for the past year and a half, was again presented by Governor Dewey to the legislature for solution when it opened its 1945 session at Albany last month.

The initial impetus to the current campaign was furnished in the autumn of 1943 by the discovery of underworld support for Thomas A. Aurelio, candidate for the Supreme Court. Accounts of that incident and of the activities of the bar on behalf of improved judicial selection that grew out of it appeared in the February and June, 1944, JOURNAL. Briefly, a Lawyers Committee on Selection of Judges was formed of representatives from all leading bar organizations of the metropolis, and that group after study drafted a bill which was introduced in the legislature providing for appointment by the governor subject to periodic vote of the people on the question of retention in office, the plan to be adopted in any district only on referendum vote of the people in that district.

The legislature considered that and a dozen other bills, and its leaders issued a statement that the subject required more study before legislative action could be taken. At the public hearing before the judiciary committees it was observed that as always there was a cleavage along geographical lines, the upstate lawyers opposing any change in selection that might affect the status quo. It never has been difficult to find an upstate New York lawyer who was willing to admit that things were in bad shape down in the city, but they have insisted upon looking on it solely as a metropolitan problem, in the solution of which they were not inclined to participate.

This "holier than thou" attitude, as it was described in a recent speech by Allen Wardwell, chairman of the Lawyers Committee, suffered a rude shock just about a year after the Aurelio incident, when an Albany grand jury published charges indicating that a justice of the Supreme Court in that city had been taking orders from local politicians on how to vote on matters pending before the court. The full story cannot be told here, nor has it yet been written, for the grand jury is still at work, but enough has come out to convince anybody who reads the newspapers that the upstate bench, like that of the metropolis, is capable of being something less than simon-pure.

Of extraordinary significance, in the light of that background, was the action of the New York State Bar Association at its meeting on January 19, in approving a committee report urging the adoption of the appointment plan introduced in the legislature a year ago.

"It has been argued against the plan that it is a blow to the people's right of free democratic choice," the approved report declared. "Aside from the fact that judges are not chosen by the people but by political leaders, the argument is as inapplicable to judges who should be highly trained men of integrity and character, as it is to state engineers or county technical employees."

The report referred to "certain public disclosures which, if true, would indicate that political leaders may exert influence over Supreme Court judges elsewhere than in New

York City—and political leaders are not chosen by the voters."

This action by the State Bar Association reverses the stand taken by it in 1933 when after extended study by the state-wide committee and heated debate at the annual meeting the Association voted 94 to 54 to adopt the committee's minority report, favoring continuation of election of judges, instead of the majority report advocating judicial selection reform.

In preparation for the 1945 legislative campaign the Lawyers Committee was expanded to a larger organization composed of both lawyers and laymen, incorporated under the title "Citizens Committee on the Courts, Inc."

In his 1945 message to the legislators, Governor Dewey reminded them of what took place a year ago and added:

"In the ensuing year, the need for a revision of the method of selection has become even more acute. Moreover, there has also been revived a deep interest in making more simple the removal of judges. Right here in the capital district, a shocking example of judicial misfeasance has occurred. To all of these problems I once again direct your attention and I earnestly trust that you will give careful study to the many excellent suggestions which will come to you from bar associations, civic groups, and others."

Federal Criminal Rules Go to Congress

With approval of the United States Supreme Court given on December 21, 1944, the new Federal Rules of Criminal Procedure are now within one step of final promulgation for use in the federal courts of the United States. They have been transmitted to Congress under a procedure whereby if that body takes no action against them during its current session they will go into effect at the close thereof.

The Supreme Court has taken an active part in the drafting of these rules. The first draft was circulated by the advisory committee in July, 1943, and after receipt of numerous suggestions and criticisms the committee prepared in November of that year a draft which was supposed to be the final one. The court, however, after inspecting it, ordered further study and discussion. A third and final report was published by the committee in July, 1944.

Even that much worked-over version was considerably altered by the Supreme Court before its transmittal to Congress. Rules 15 and 16 dealing with pre-trial procedure and notice of alibi were deleted; the provision in Rule 17 authorizing the government to take depositions was taken out; Rule 52 on communications by counsel to judge was omitted; and parts of other rules were stricken.

Only seven of the justices joined in the approval of the rules. Justice Black disapproved and Justice Frankfurter, declining to pass on the merits of the rules themselves, objected to the entire principle of judicial rule-making power.

Pre-Trial Approved by New Jersey Judges

"In retrospect, the signal accomplishment of the annual mid-winter meeting of the State Bar Association was the endorsement by the circuit court judges of pre-trial conferences similar to those provided for under Rule 16 of the Federal Rules of Civil Procedure. Judge Henry E. Ackerson in the institute of medical testimony remarked upon the effectiveness of pre-trial conferences in saving time in the proof of "hospital, nurses', doctors' and x-ray pictures and their authenticity, obvious injuries and disabilities and their extent, the experience and qualifications of medical experts and the limitation of their number." At the close of the institute the lawyers at the request of Judge Ackerson put the matter to a vote, voting almost unanimously in favor of the pre-trial procedure proposed by the judge.

"This column has several times advocated for the state courts of New Jersey a like procedure, and it may be hoped that, with the building up of the sentiment of the bar, the New Jersey Supreme Court can now be induced to add to its rules of court a rule like Rule 16 of the Federal Rules.

"In summation Judge Ackerson put the matter strongly: 'The adoption of a liberalized, simple and effective pre-trial procedure for the courts of our own state would stimulate a greater confidence in and respect for the system of trial by jury and provide a needed antidote to the rapid growth of administrative law.'"—*New Jersey Law Journal.*

Alabama Judicial Council Is Organized

A new Alabama Judicial Council has been organized by authority of a resolution of the Board of Commissioners of the Alabama State Bar, and its first meeting was scheduled for January 26.

The Council consists of Chief Justice Lucien D. Gardner of the Supreme Court; Presiding Judge C. R. Bricken of the Court of Appeals; Circuit Judges Walter B. Jones, J. Russell McElroy and Charles R. Wiggins, appointed by the Chief Justice; Attorney-General Wm. N. Mc-

Queen; Charles E. Shaver and Norman W. Harris, chairmen of the two judiciary committees of the state legislature; Dean Wm. M. Hepburn of the University of Alabama Law School; and five members of the bar, John A. Caddell, Crews Johnston, Ed W. Pettus, R. T. Rives and Frank E. Spain, appointed by the governor.

Purposes of the Council are to make a continuous study of the administration of justice in the state, and of the organization and procedure of the courts, to receive criticisms and suggestions regarding the administration of justice, and to make recommendations to the legislature, the courts, the bar, or otherwise, for the improvement of the administration of justice. It is also to collect and publish statistics regarding the work of the courts, and will issue annual reports.

The Alabama Judicial Council is the fourth to be created through the machinery of the state bar organization. The others are those of Arizona, South Dakota and Utah.

Judicial Retirement Bills Introduced

Judicial retirement bills are under consideration in a number of the states.

A bill now before the Michigan legislature with State Bar approval would retire judges any time after eighteen years of service, at age sixty-five after twelve years of service, or at seventy after eight years, on full pay, subject to recall by the Supreme Court for special service if needed.

A Delaware bill would retire Delaware judges at seventy after twelve years of service, on half pay, and with a commission as vice-chancellor.

The Ohio bill proposes the establishment of a contributory retirement system administered by the Public Employees' Retirement Board, under which judges would be eligible for retirement at age sixty after twelve years of service. Retirement compensation would range from $3,000 to $6,000 a year, being not less than one fourth nor more than half of the judge's last salary, the exact amount depending on the exact length of the individual's service record. Judges would contribute four per cent of their salaries toward the retirement fund.

President Joe B. Dooley of the Texas State Bar, and President Edmund B. Shea of the Wisconsin Bar Association, in recent speeches have endorsed judicial retirement proposals and urged their adoption in their states.

Utah Selection Reform Up to Legislature

Climaxing a thirty-year campaign for judicial selection reform, the Utah State Bar is going to the legislature this year for enactment of legislation to provide for an appointive judiciary after the Missouri pattern.

The elective system was embedded in the Utah constitution, and for many years the Utah bar tried in vain to get the legislature to submit a constitutional amendment providing for a better method. After repeated defeats, the commissioners asked for a vote of the bar as to whether the efforts should be continued, and got an overwhelming affirmative response. Thereupon, they drafted another amendment providing for judicial selection "in such manner as shall be provided by law" and that was defeated in 1941 but passed the legislature in 1943 and was approved by the people by a vote of more than three to one in the 1944 general election.

The way is now open for judicial selection reform through legislative action only, and Orval Hafen, State Bar president, has declared that the heavy popular majority for the amendment constituted a mandate to the legislature to enact legislation establishing a selection plan that will be an improvement over the one now in effect.

Use of Pre-Trial Procedure in State Courts

A clinic on pre-trial procedure was held under the joint auspices of the Special Committee on Improving the Administration of Justice and the Section of Judicial Administration of the American Bar Association in the Circuit Court of Appeals Building, Chicago, September 12, 1944, as a part of the program of the annual meeting of the Association.

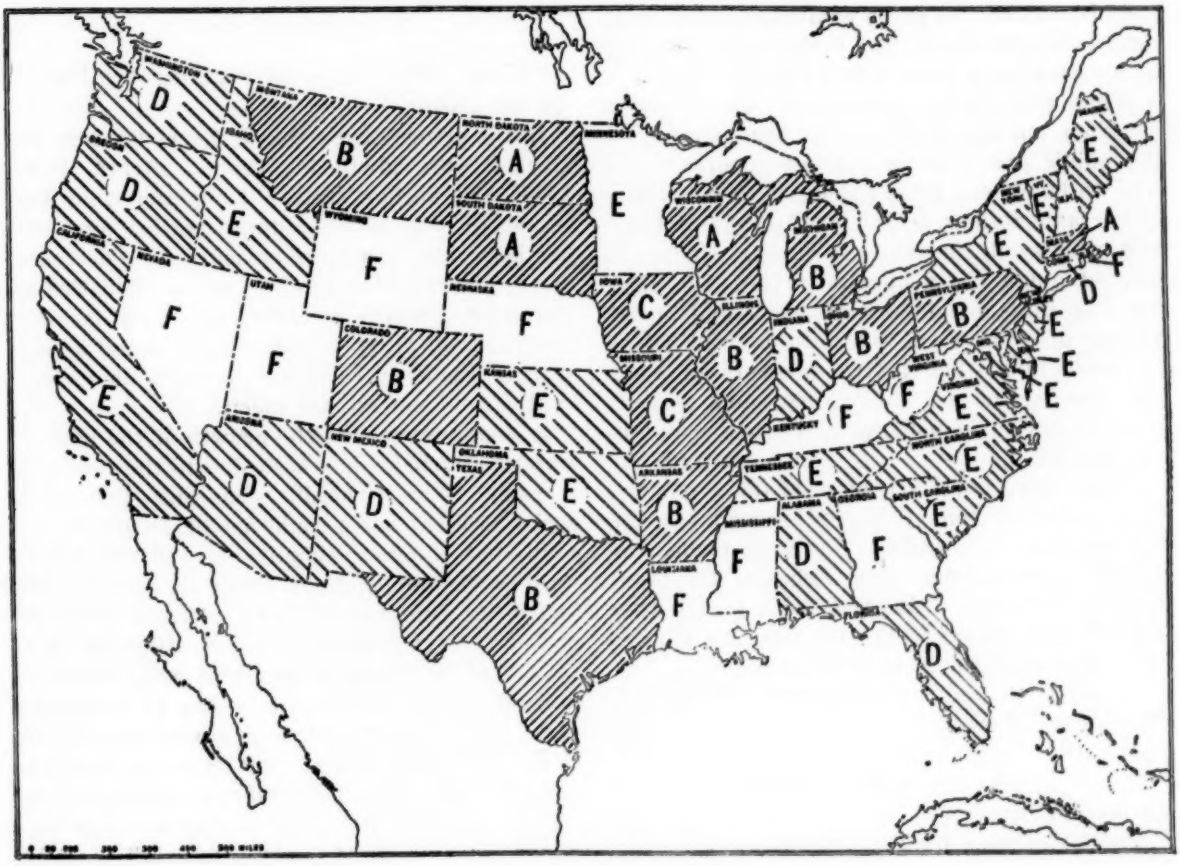
The clinic consisted of demonstrations of model pre-trial conferences conducted before Federal Judges Alfred P. Murrah of Oklahoma and Bolitha J. Laws of the District of Columbia, and Circuit Judges Joseph A. Moynihan of Detroit and Harry M. Fisher of Chicago, with concluding comments by Professor Edson R. Sunderland of the University of Michigan. So well planned and executed were the demonstrations and so vividly did they show the advantages of pre-trial procedure that the JOURNAL

would gladly have given its readers the entire proceedings had it been possible. A rough calculation of the amount of type required, however, indicates that such a transcript would have filled about one and a half issues of the JOURNAL. We are glad to be able to report that the entire proceedings have been published and made available to the profession in the October number of *Federal Rules Decisions* (4 F. R. D. 35-103).

The account in *Federal Rules Decisions* includes a copy of the report of the Committee on Pre-Trial Procedure of the Judicial Conference of Senior Circuit Judges, based on the same source material as the paper by Will Shafroth, secretary of the committee, published in our last August number (28:39) under the title "Pre-Trial Techniques of Federal Judges," and a review of the extent of use made of pre-trial procedure in the state courts of each of the forty-eight states. The JOURNAL has obtained special permission to rearrange and publish that information in visual form as shown in the accompanying map and notes.

Since this summary was made, New Jersey judges have endorsed the state-wide use of pre-trial, and the Supreme Court of Michigan has published new rules including a pre-trial rule similar to Federal Rule 16.

USE OF PRE-TRIAL PROCEDURE IN THE STATE COURTS



DARK SHADED STATES

A—Pre-trial procedure in regular use throughout the state.

B—In regular use in one or more large cities and some smaller communities (Michigan, Detroit only).

C—Authorized by new rules, and prospects good for extensive use.

LIGHT SHADED STATES

D—Authorized by statute or rule of court, but little used.

E—Rare or occasional use by individual judges, without statute or rule of court.

BLANK STATES

F—Not used at all. Minnesota was left blank in error. It should be light-shaded.

Letters to the Editor

About the Selecting of Judges

To the Editor:

For a good many years I have been a student of proposals for a better method of selection of judges, but regret that I have not yet found or have not witnessed a solution of a problem we all know must be solved. My skepticism is based on a practical problem, not, as it may seem, on an aspiration to perfection.

Let us take the current and most favored proposals of a nominating body. Whatever their pattern is we must still meet the crucial problem: How is that body going to discover the person who is to be nominated and how are his capabilities to be evaluated? The body cannot travel about the community like the prince seeking a Cinderella to fit the shoe.

What, then, is the process? Is the choice to be from among those names that appear in the public press, or in the law reports? Are they to be chosen from among the most active in bar associations or in clubs? None of these will necessarily provide an honest judge, a learned judge and a humane judge. The playing of politics and favoritism are found in bar groups and other associations as well as in political clubs. The active members of some bar associations are those very same persons who are active in political and other community matters.

While there is an urgent need for a remedy, it is essential that changes be made to the near-perfect as possible, for once made, the undoing becomes even more difficult. The point I raise, however, it is submitted, is one that must be considered in determining the plan to be chosen or in the mechanics of it.

EMANUEL REDFIELD

New York, N. Y.

A Protest from Vermont

To the Editor:

I notice in your JOURNAL for December, 1944, on page 106 you give the per capita expense of the lower courts in Vermont at $1.01. Do you have any breakdown of these figures, or can you tell me where you obtained them? Judging by our financial reports these figures would include clerks, prosecuting and enforcement officers' salaries and make no deduction for court fees and fines, and even without these deductions I think the figure is excessive.

HARRISON J. CONANT,
State Librarian.

Montpelier, Vt.

Neither the JOURNAL nor the Society is responsible for these figures. The credit line was inadvertently omitted. They were taken from a booklet *Per Capita Cost of Courts* written and published by Alexander B. Andrews, Raleigh, N. C., former member of the American Bar Association Special Committee on Judicial Salaries.—*Editor.*

That's What Rules of Practice Are For

To the Editor:

In the article "Let's Decide Every Case on Its Merits" [by Edwin F. Woodle, 28:118, Dec., 1944] the author states his opinion that the recent growth of the administrative agencies has been due, in a large measure, to a decrease of confidence in the administration of justice in the courts, which he attributes to a lack of simplicity in practice and procedure and a consequent tendency to decide lawsuits on technicalities and not on the merits.

It seems to me that the growth of the administrative agencies has been due to the needs of a complex and rapidly changing industrial society which courts could not deal with in the nature of things. Simplifying judicial procedure would not enable a court to exercise the legislative function of fixing railroad rates or making orders relating to public utility service.

As for the author's plea that every case be decided on its merits, this seems so obviously right that to question it is to expose one to the charge of pettifogging. But rules of pleading and procedure were designed to promote and not retard the administration of justice, and insistence on a strict compliance will usually facilitate a decision on the merits. I had occasion recently to comment publicly on the matter of specific and general denials. In Pennsylvania a defendant is required to deny specifically every averment in the plaintiff's statement of claim. I brought a suit to recover from a defaulting bank official. There were over four

hundred items. The defendant denied generally that he had taken any money. The court held a general denial to be insufficient and entered judgment for the claim. Had I been forced to try the case it would have required the attendance of scores of witnesses, would have seriously inconvenienced the bank and its customers in the transaction of their business, and resulted in the heavy expense that goes with every protracted trial. Surely the ends of justice were served here by requiring a strict compliance with a technical rule.

I do not think anybody wants to go back to the days of special pleading. But an attempt to decide every lawsuit on its merits may produce much more injustice and resultant loss of confidence in the courts than requiring a strict compliance with the rules.

C. ELMER BOWN.

Pittsburgh, Pa.

Current Literature

BOOKS

Arbitration in International Controversy, by Frances Kellor and Martin Domke. Issued by the Commission to Study the Organization of Peace, 8 West 40th St., and the American Arbitration Association, 9 Rockefeller Plaza, New York. Paper, 101 pp.

At a time when all the institutions of international dealings are being scrutinized for their possible use in the plans for ordered peace in the post-war world, it is surely important to review the experience and appraise the capacity of arbitration in the settlement of disputes. In this study, written by experienced and competent authors, the various sources of international controversy are reviewed, along with the use heretofore made of arbitration in that field, and valuable suggestions are offered with respect to desired international policies, reorganization of international arbitration machinery, and promotion of this useful antidote to misunderstanding and war among nations.

War Criminals: Their Prosecution and Punishment, by Sheldon Glueck. New York: Alfred A. Knopf, 1944. 250 pp. $3.00.

What shall be done with the Nazi-Fascist war criminals? The problems involved in answering this question are enormously complex. A rational and civilized approach to the issues presented must entail consideration of puzzling tangles of international and municipal law; of military and non-military law; of public policy on both national and international law; of military and non-military law; of public policy on both national and international planes, of criminology and penology; of social psychology and social ethics.

An attempt to lay bare the major technical issues of law and polity involved in the development of even a fairly acceptable program for the treatment of war criminals ought in these times to be of special value. That is what this book purports to do.—*Quoted from the author's preface.*

Legal Aid Clinic Instruction at Duke University, by John S. Bradway. Durham, N. C.: Duke University Press, 1944. Paper, 126 pp. $1.50.

This is the third in a series of Duke University publications on the legal aid clinic. The first, in 1938, was entitled *How to Establish a Legal Aid Clinic.* The second, revised annually by the clinic staff, is *Instructions to Students.* The present volume might have borne the corresponding title *Instructions to Teachers,* as indicated by the chapter headings: The initial problems; first semester methods; second semester methods; briefing work and preparation of cases for trial; time, examinations and grading; and conclusions.

This book is worth reading not only by those having a technical interest in the operation of a law school legal aid clinic, but by lawyers

who have had the customary law school education but not the special training afforded by the clinic. The contrast between the two is well brought out in the opening chapter:

"It is one thing in the class or seminar room, or in the law library, to adopt a cool, impersonal, critical and scholarly attitude as an observer of some controversy which has been handled by competent attorneys and a succession of courts and to determine what is the law or what mistakes were committed. In such a situation the student's minimum responsibility is to earn a passing grade in the course.

"It is something else to be a harried participant in a real uncompleted case; to have to do 'leg work' amid unfamiliar and sometimes hostile surroundings; to interview a first client; to realize that 'facts' in a hypothetical case are given as the point of departure, while the 'facts' in a real case may be secured only as the result of an expenditure of energy, imagination, and a thinking process not unlike that in which the detective of fiction indulges; to feel the sobering shock of ultimate responsibility in the making of decisions which should be, as nearly as possible, 100 per cent correct or the life, liberty and property of our clients might suffer; to realize that cases are won in the law office by careful planning and ceaseless labor more often than by inspiration in the courtroom."

ARTICLES

Briefing and arguing cases on appeal. Atwood McDonald. 7 Texas Bar Journal 394 (Dec., 1944).

Selecting jurors for service in the district courts of the United States. John C. Knox. 21 Dicta 283 (Dec., 1944).

Glimpses of federal trials and procedure. Grover M. Moscowitz. 67 New Jersey Law Journal 405, 413 (Dec. 7, 14, 1944).

Selection of judicial candidates. Frank Hartgraves. 22 Texas L. Rev. 95-100 (Oct., 1944).

Selection of judges. Henry Epstein. 2 Bar Bulletin (N. Y. County Lawyers Ass'n) 5 (Jan., 1945).

The Selection of Justices of the Supreme Court in New York State. Theodore Kiendl. 67 N. Y. State Bar Ass'n. Proc. 397 (1944).

New Members of the American Judicature Society

Alabama

WALTER B. JONES, Montgomery

Arizona

ARTHUR G. BAKER, Prescott
RALPH BARRY, Phoenix
ARCHIE R. CONNER, Tucson
A. M. CRAWFORD, Prescott
HAROLD L. DIVELBESS, Phoenix
THEODORE N. DORO, Phoenix
M. J. DOUGHERTY, Phoenix
A. J. EDDY, Yuma
SAMUEL H. FOWLER, Tucson
DODD L. GREER, Holbrook
CARL G. KROOK, Kingman
JOHN D. LYONS, JR., Tucson
H. S. MCCLUSKEY, Phoenix
J. R. MCDOUGALL, Phoenix
CLIFFORD R. MCFALL, Tucson
URBAN R. MILLER, Williams
ALLAN K. PERRY, Phoenix
L. VERDE RHUE, Phoenix
CAVETT ROBERT, Phoenix
JAMES V. ROBINS, Nogales
FRED W. ROSENFELD, Phoenix
T. K. SHOENHAIR, Tucson
WILLIAM SPAID, Phoenix
R. C. STANFORD, Phoenix
R. C. STANFORD, JR., Phoenix
FRANK E. THOMAS, Bisbee
H. A. WARDENBURG, Ajo
MARK WILMER, Phoenix
C. B. WILSON, Flagstaff
FRED O. WILSON, Phoenix

District of Columbia

HELEN MAY BLOEDORN, Washington
REEVE LEWIS, Washington

Michigan

ALBERT E. BLASHFIELD, Lansing
PAUL R. CASH, Alma
JOSEPH H. COLLINS, Corunna
GLENN M. COULTER, Detroit
GEORGE W. DESJARDINS, Lapeer
DOUGLASS K. FISCHER, Detroit
CARL W. FORSYTHE, Ferndale
CLAYTON C. GOLDEN, Monroe
RAY HART, Midland
GEORGE B. HARTRICK, Pontiac
THEO. T. JACOBS, Sturgis
FRED T. MILES, Holland
LILA M. NEUENFELT, Detroit
G. ARTHUR RATHBUN, Adrian
HERBERT W. RUNNELS, Sault Ste. Marie
DANIEL G. SHEA, Detroit
DALE SOUTER, Grand Rapids

Missouri

SHEPARD R. EVANS, St. Louis
JOHN F. REINHARDT, Kansas City

Nebraska

ORLIN A. WEED, Omaha

North Dakota

JOHN A. ALPHSON, Grand Forks
L. R. BAIRD, Dickinson
ASMUNDUR BENSON, Bottineau
W. FULTON BURNETT, Fargo
PAUL CAMPBELL, Minot
EDWARD T. CONMY, Fargo
EUGENE F. COYNE, LaMoure
W. H. ESTERLY, Beulah
A. O. GINNOW, Ashley
THELMA J. HOVET, Bismarck
VERNON M. JOHNSON, Wahpeton
C. E. JOSEPH, Cando
JOHN KEOHANE, Beach
F. A. LEONARD, Fargo
ALBERT LUNDBERG, Grafton
F. E. MCCURDY, Bismarck
C. G. MEAD, Lisbon
MILTON MOSKAU, Grand Forks
A. G. PORTER, LaMoure
JOHN SAD, Valley City
CHARLES H. SHAFER, Hillsboro
FRANK E. SHAW, Sheldon
LINN SHERMAN, Steele
GEORGE D. SMITH, Grand Forks
F. S. SNOWFIELD, Cavalier
MARIE K. E. STIENING, Fargo
ALVIN C. STRUTZ, Bismarck
H. W. SWENSON, Devils Lake
MACK V. TRAYNOR, Devils Lake
CORBIN A. WALDRON, Minot
BURTON WILCOX, Center
MAX A. WISHEK, Ashley
GAIUS S. WOOLEDGE, Minot

Oregon

JAY H. STOCKMAN, Astoria

Tennessee

NELL SANDERS, Memphis

Utah

A. O. JOHNSON, Salt Lake City